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Considerable dissatisfaction exists among practitioners in the Federal Courts embraced within the Eighth Judicial Circuit, on account of delay in the trial of causes, growing out of the fact that judges of the district court are compelled to serve on the bench of the United States Circuit Court of Appeals. In theory, at least, the latter court consists of the Supreme Court Justice assigned to that circuit (Justice Brewer) and the two circuit judges (Caldwell and Sanborn). As a matter of fact, however, the former seldom sits, and one of the district judges is usually assigned to sit with the circuit judges. For some time Judge Shiras of the Iowa district served in that way on the appeals bench. Latterly, however Judge Thayer of the Eastern Missouri District has acted as a member of the court. As a result, the business of the district and circuit courts for the Eastern District of Missouri has had little attention, to the annoyance of attorneys and damage to litigants. In fact the St. Louis Federal Courts have been practically without a judge for nearly a year and will be so for some time, unless relief can be obtained. The other district judges have been obliged to shift about as best they can and look after the work of the abandoned court, to the detriment of their own.

The fact of the matter is, that there is urgent need for the appointment of an additional circuit judge for the eighth circuit. We understand that bills have been introduced in both houses of congress, having that end in view. It provides that there be appointed for the eighth judicial circuit, by the President of the United States by and with the advice and consent of the Senate, in addition to present circuit judges, another circuit judge, who shall have the same qualifications and the same power and jurisdiction therein that the present circuit judges have under existing laws and who shall be entitled to the same compensation as the present circuit judges. This bill has in each house been referred to the judiciary committee and it is hoped by friends of the measure that an early and unanimous report in its favor will be made.

The extent of the Eighth Federal Judicial Circuit not only as regards territory and population, but also in the amount of business before the Court of Appeals will surprise many and is a strong argument in favor of the appointment of an additional circuit judge. The circuit includes within its boundaries Missouri, Arkansas, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Wyoming, Utah, Colorado and New Mexico. Their combined area is 1,021,085 square miles and their population 10,586,045—over one-third of the entire area of the United States and more than one-sixth of the entire population. No other circuit compares with it in size and its appellate business is greater than that of any other and more than twice as great as any other circuit except the second in which New York City is located. That circuit embraces New York, Vermont and Connecticut, and although the court of that circuit has less business than the eighth, it is provided with three regular circuit judges who sit all the time. The relative amount of business of the different Courts of Appeal will be best understood by the number of cases docketed in those courts as per a late report of the Attorney-General. According to that report there were forty in the first circuit, one hundred and ninety-six in the second, forty-two in the third, thirty-eight in the fourth, eighty-six in the fifth, seventy-seven in the sixth, seventy-nine in the seventh, two hundred and seven in the eighth, and seventy-eight in the ninth. It will thus be seen that there is more ground for the appointment of a third judge for this circuit than even for the second or New York circuit and it would be well for practitioners of the Eighth circuit to urge their congressional representatives to prompt action in the matter.

A recent English case—Macdonald v. The National Review—is of peculiar interest and value to journalists and its lesson may not be wholly lost upon contributors to law journals. In that case the plaintiff, a Canadian journalist, sought to recover from the proprietors of the *The National Re-*

view the price of an article which he had written and submitted to the editor's consideration, *ex proprio motu*, and which had been set up in type, sent to him for correction, and returned revised. The article was not published within what Mr. Macdonald deemed "a reasonable time;" he complained of its non-appearance, and got back the manuscript, with an implied refusal to insert it, by return of post. The plaintiff contended that by putting his manuscript into type and sending him a proof for revision the editor had in law "accepted" his article, and was bound to publish or pay for it within a reasonable time. The defendants, on the other hand, maintained and produced strong evidence to prove that this position was according to journalistic custom, untenable. But the judge agreed with the plaintiff and held that to print a manuscript and send the author a proof for correction is to exercise over it the *dominium* which constitutes an acceptance in law.

It is quite evident that the learned judge who reached that conclusion was never a journalist. But if he is right and if, as the *London Law Journal* very properly says "an article, ultroneously written and sent to a journal, is accepted whenever the editor puts it in type, and must be published or paid for within what a court of law not endowed with journalistic instincts or guided by journalistic experience considers a reasonable time, we can only say that the difficulty which the free-lance or outside contributor at present finds in penetrating the charmed circle of journalistic success will be tenfold increased."

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATIONS—POWERS—CONSTITUTIONAL LAW—ORDINANCE PROHIBITING SCREENS IN SALOONS.—The case of Champer v. City of Greencastle, 35 N. E. Rep. 14, decided by the Supreme Court of Indiana involves interesting questions of constitutional law as to the powers of municipal corporations. The holding is that unless the legislature has, in terms, conferred on a municipal corporation the power to pass ordinances relating to a particular subject, the courts may inquire into the reasonableness of an ordinance on such subject enacted under the general or incidental power of such corporation, modifying Coal Float v. City of Jeffersonville, 13 N. E. Rep. 115, 112 Ind. 15, and Railway Co. v. Harrington, 30 N. E. Rep. 37, 131 Ind. 426. Rev. St. 1881, §§ 3106, 3154, which empowers cities "to regulate and license all inns, taverns or other places used or kept for public entertainment; also, all shops, or other places kept for the sale of liquors to be used in and upon the premises," and "to regulate all places where intoxicating liquors are sold to be used on the premises," and the general welfare clause, do not empower cities to pass ordinances prohibiting the use of screens or other obstructions to the view at the doors and windows of saloons, and the courts may inquire into the reasonableness of an ordinance of such character. An ordinance which forbids the erection or maintenance of door screens, window blinds, stained ground, colored, or darkened glass, at the doors, windows, or openings of any saloon, shop, or other place where intoxicating liquors are sold to be used on the premises, or of any obstruction of such doors, windows, or openings that will obscure or prevent a full view of the interior of such saloon, provided it is not to be so construed as to prevent saloon keepers from having the usual and ordinary shutters to their doors, is unreasonable and void.

TRUSTS—EVIDENCE—RESULTING TRUSTS—PURCHASE PRICE.—In Bourke v. Callanan, 35 N. E. Rep. 460, the Supreme Judicial Court of Massachusetts hold that an oral promise by defendant to purchase land of plaintiff at a foreclosure sale thereof, and to hold it for plaintiff's benefit, is insufficient to charge the land so purchased by defendant with a trust in plaintiff's favor. At the sale defendant bid $35,500 for the land. Two days after, he received a deed, and gave a mortgage thereon to secure his note for $33,000 of the price. On the same day he paid the balance, plaintiff furnishing $1,427 for that purpose. It was held insufficient to create a resulting trust in plaintiff's favor. Allen and Knowlton, JJ., dissent from the conclusions of the court. Holmes, J., for the court says:

This is a bill in equity seeking to charge the defendants with a trust in respect of certain land formerly belonging to the plaintiff and his brother, as copartners, and purchased by the defendants at a foreclosure sale. The only prayers are for an accounting, for rents and profits, and for a decree for a conveyance upon payment of whatever is due from the plaintiff

to the defendants. One ground relied on is that, the plaintiff's brother having no beneficial interest in the land, and the plaintiff wishing to get a clear title to it, and therefore wishing a mortgage on it to be foreclosed, the defendant Callanan promised him to go to the sale, and to bid off the property for him. The answer to this is that the promise was not in writing, that the defendant has the legal title to the land, and that he is not to be charged with a trust on the ground of an oral promise. Pub. St. ch. 141, § 1; Emerson v. Galloupe, 158 Mass. 146, 32 N. E. Rep. 1118.

The other ground relied on is that there was a resulting trust, because the defendant made the purchase with the plaintiff's money. The mortgage sale was on June 25, 1889, at which date the defendant bid $35,500. On June 27th he received his deed, and gave a mortgage back for $33,000. The mortgage note was signed by the defendant personally and alone. At the same time, as we understand the master's report, which is a little obscure on these points, the defendant paid over $2,034.60 in cash, the remaining $465.40 being retained by him until a later date. On the same June 27th the defendant received from the plaintiff $1,437, and no more. It is impossible, therefore, to say that the consideration actually was furnished by the plaintiff at the time of the purchase. Payment of part of the consideration is not enough, and the mere fact that the defendant had agreed to buy for the plaintiff will not convert a payment of his own money into a loan to the plaintiff, and thus indirectly create a resulting trust, in the mode which we are discussing, out of an oral agreement, which could not be allowed any direct effect except in the teeth of the statute. See McGowan v. McGowan, 14 Gray, 119, a case very like the present. In Olcott v. Bynum, 17 Wall. 44, 59, where the purchaser paid cash advanced by the plaintiff, and gave a mortgage for the residue of the purchase money, the cash not having been paid for any aliquot part, it was held that the principle of resulting trusts had no application, and that, if it did, it could have no application in respect to the sum for which the purchaser gave his own obligation. McDonough v. O'Neil, 113 Mass. 92, was not intended to controvert or to qualify McGowan v. McGowan in any way. In that case the purchase was of an equity of redemption for cash, not of unincumbered land for cash and a mortgage back. The resulting trust was of the equity of redemption only. The defendant, it is true, made a new mortgage note, but not to the vendor Godfrey, or at his requirement, but to the former mortgagee, Clements, at his requirement. This mortgage had been paid off by the plaintiff's testator before the bill was brought. In the opinion of a majority of the court, the plaintiff is not entitled to a conveyance of the property.

We are aware that by our construction of Pub. St. ch. 141, § 1, the statute of frauds may be made an instrument of fraud. But that always is true whenever the law prescribes a form for an obligation. The very meaning of the requirement is that a man relies at his peril on what purports to be such an obligation without that form. Bragg v. Danielson, 141 Mass. 195, 196, 4 N. E. 622; Parker v. Barker, 2 Metc. (Mass.) 423, 431. If the present case suggests the possibility that wrong may be accomplished through the forms of law, it equally suggests the danger which the statute was intended to meet. What might have been regarded by the defendant as a mere promise to resell to the plaintiff easily might have been interpreted by the plaintiff as the assumption of an agency. In fact, it is unlikely that the distinction between the two positions was thought of by the parties, even if they would have understood it if it had been presented to them. In either case, the defendant, in a popular sense, might be said to promise to buy the land for the plaintiff.

CARRIERS OF PASSENGERS—COLLISION OF TRAINS—CONCURRENT NEGLIGENCE.—In Matthews v. Delaware L. & W. R. Co., decided by the Supreme Court of New Jersey it is held that one injured by a collision between a locomotive of a railroad company and a car (in which he was a passenger) of a street railway company may maintain a joint action against both companies if the collision was produced by the neglect of the railroad company to give notice of the approach of the locomotive, concurring with the neglect of the railway company to observe proper care in crossing the railroad track. Although such duties are diverse, and the neglect to perform each is separate and disconnected, yet, as the wrong-doing of one company unites with that of the other in causing injury, the tort is joint, and one or both tort-feasors may be sued. Magie, J., says:

It is lastly contended in behalf of the railroad company that the verdict against it should be set aside, because there was no proof of joint negligence on the part of the two defendants. The claim is, as I understand from the argument, that these defendants cannot be jointly sued for an injury occasioned by such a collision, unless the neglect which caused the collision was of a joint duty owed by both defendants, and that, on failure of proof of a joint duty and joint neglect, neither defendant can be held. If this contention is sound, it is obvious that the declaration was demurrable, for it charged that the railroad company owed to plaintiff a duty to give notice of the passage of its trains across the tracks of the railway company, and that the railway company owed to him a duty to take precautions in carrying him across the tracks of the railroad company, and it averred that each company had neglected to perform the several duties thus charged, and that thereby the collision which injured plaintiff occurred. But the contention is wholly inadmissible, and the declaration would plainly have been good on demurrer. The error arises out of a misconception as to the nature of a joint tort. If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort-feasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort-feasors are subject to a like liability. This doctrine was announced in this court by the chief justice in Newman v. Fowler, 37 N. J. Law, 89. The like doctrine was applied by the Court of Appeals in New York to a case identical with that under consideration. Colegrove v. Railroad Co., 20 N. Y. 492. That case has been mentioned with approval in Barrett v. Railroad

Co., 45 N. Y. 628; Slater v. Mersereau, 64 N. Y. 138; Insurance Company v. Austin, 69 N. Y. 470. See, also, Cooper v. Transportation Co., 75 N. Y. 116. The same view is taken in other courts. Railroad Co. v. Schacklet, 105 Ill. 364; Transit Co. v. Schacklet, 119 Ill. 232, 10 N. E. Rep. 896; Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. Rep. 14; Cuddy v. Horn, 46 Mich. 596, 10 N. W. Rep. 32. I have not discovered any dissent from this doctrine, except in Pennsylvania, the courts of which State, while admitting the general rule, make an exception of cases where the injured party was the passenger of a carrier whose negligence concurred with the negligence of another in producing the injury. The reason of this exception, however, is that those courts adhere to the doctrine of Thorogood v. Byran, 8 C. B. 115, which has always been repudiated in New Jersey, and is now expressly overruled in England. The Bernina, 12 Prob. Div. 58, 13 App. Cas. 1. The Pennsylvania cases are Lockhart v. Lichtenthaler, 46 Pa. St. 151; Borough of Carlisle v. Brisbane, 113 Pa. St. 544, 6 Atl. Rep. 372; Dean v. Railroad Co., 129 Pa. St. 520, 18 Atl. Rep. 718; Klauder v. McGrath, 35 Pa. St. 128; Railroad Co. v. Mahoney, 57 Pa. St. 187. The declaration therefore set out a good cause of action against two joint tort-feasors, and there can be no doubt that in such an action one defendant may be held liable alone if the proof justify it. The verdict against the railroad company should not be disturbed.

MUTUAL BENEFIT INSURANCE—ACTION ON POLICY—VENUE — BY-LAWS.— The Supreme Court of Illinois in Railway Passenger & Freight Conductors Mut. Aid Ass'n v. Robinson, made some important rulings regarding mutual benefit societies organized under Illinois statutes some of which have application in other States. The points decided were as follows:

1. Rev. St. 1891, ch. 110, § 3, which declares that "the Circuit Court of the county wherein the plaintiff or complainant may reside shall have jurisdiction of all actions hereafter to be commenced by any individual against any fire or life insurance company," applies as well to suits in equity as to actions at law.

2. Said statutes applies to mutual benefit societies, although Rev. St. 1891, ch. 73, § 133, declares that such companies "shall not be deemed insurance companies, nor subject to the laws of this State relating thereto, but shall comply with all the requirements of this act," since the intent of the latter act is simply to exempt such companies from the duty of complying with the requirements of the general insurance law of the State governing the entire business of fire and life insurance, and to substitute therefor a code of rules applicable to such companies.

3. In an action against a mutual benefit society to recover for a death loss, an unsworn certificate of the doctor who attended the decedent in his last illness, to the effect that decedent contracted the disease of which he died before he joined the society is inadmissible as evidence of that fact, even though the certificate was inclosed with or attached to the proofs of death served on the society. 38 Ill. App. 111, affirmed.

4. The constitution of a mutual benefit society provided that mortuary assessments should be made only by authority of the board of directors, and the by-laws made it the duty of the secretary, in case of a member's death, to submit the proofs of death to the board, and declared that with their indorsement and the approval of the president an assessment should be made: Held, that these provisions did not leave the making of an assessment, in case proper proofs of death were presented, to the mere discretion of the board.

5. The fact that a membership certificate in a mutual benefit society contains no promise to pay mortuary benefits does not relieve the society from the duty of paying the same where provisions to that effect are found in the constitution and by-laws, since they are considered as part of the membership certificate.

6. The first paragraph of a certain article of the constitution of a mutual benefit society provided that all claims against the society should be referred to the board of directors, and be paid by the secretary upon approval of a majority of the board, while the second paragraph declared that it should be the board's duty to examine all books and accounts of the society, know that its business is properly conducted, and "decide all points of dispute and questions of doubt that may arise; and their decision shall be final: Held, that the questions on which the directors' was to be final were those that might arise from examination of its accounts aed management of its business, and did not include the right to decide finally claims against the association for mortuary benefits.

DELIVERY IN DONATIONES MORTIS CAUSA.

II.

4. Delivery to the Donee.
5. Delivery to Some One in Trust for the Donee.
6. Delivery to Some One in Trust for the Donee, to be Delivered after the Donor's Death.
7. Continuous Change of Possession.
8. Delivery by Delivering Means of Obtaining Possession.
9. Prior Possession and After-acquired Possession.
10. Time of Making Delivery.
11. Delivery Coupled with a Trust.

4. *Delivery to the Donee.*—To constitute a valid gift *mortis causa*, there must be a complete delivery to the donee[44] and a retention of possession by him until the death of the donor;[45] but it is not the possession of the donee so much as the delivery of the thing given by the donor that is material.[46] The intention to

[44] Jones v. Deyer, 16 Ala. 221; Raymond v. Sellick, 10 Conn. 480; Dunbar v. Dunbar (Me.), 13 Atl. Rep. 578; Parcher v. Saco & Biddiford Sav. Bk. (Me.) 3 N. Eng. 239; Dickeschied v. Exchange Bk., 28 W. Va. 340; Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926. On the 18th of October, 1832, A, who was sick, and died on the 1st of November, gave two watches to B. On the 22d of October he made a will giving the watches to B, in whose possession he had placed them." On the 29th A made a will giving all his property to C, and the court held that B was entitled to the watches. Nicholas v. Adams, 2 Whart. (Pa.) 17.

[45] Dunbar v. Dunbar (Me.), 13 Atl. Rep. 578; Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926.

[46] Dickerschied v. Exchange Bk., 28 W. Va. 340

give is always a controlling element to be considered in this class of gifts the same as in gifts *inter vivos*. An intention to give is sufficiently manifest to constitute a valid gift *causa mortis*, from the fact that a person *in extremis* attempts to dispose of a portion or the whole of his property.[47] However, it is not always necessary that there shall be a delivery to the donee and a retention of possession by him until the donor's death. Thus it is said in the case of Southerland v. Southerland,[48] that a promissory note may pass as a gift *causa mortis*, without actual delivery to the donee, when such note is in the possession of a third party as trustee for the equitable owner. As to delivery to trustee for the donee, see the following subdivisions.

5. *Delivery to some one in Trust for the Donee.*—While it is true that the delivery of a gift *mortis causa* is indispensable to the validity of the donation, yet it is immaterial to such validity whether that delivery is made to the donee immediately, or to another in trust for him;[49] but such a delivery to a third person in trust for the donee must be complete and pass the full possession to the thing given,[50] for where the direction is merely the expression of the wish or will of the party, and the possession is not coupled with a trust, a duty to perform in relation to the thing given, it will not be such a delivery as will constitute a good gift *mortis causa*. Thus where one, in expectation of death, instructs an attendant to take from a book a paper upon which is written his wishes as to the disposition of certain property, stating where it will be found, and that the statement is his will, what he wants done, and requests the attendant to take charge of the property, the transaction does not amount to such a delivery as will constitute a valid gift *causa mortis*.[51] The Supreme Court of Colorado, in the case of Connor v. Root,[52] say that where a certificate of deposit is delivered by a person during his illness, in anticipation of death, to another person for the use of a third, it is a valid gift *causa mortis*, and the title passes from the death of the donor, although the certificate, payable to the latter's order, was not indorsed by him; but in Thompson v. Dorsey,[53] the Maryland Court of Chancery held invalid as a gift *causa mortis* the delivery by A to B, of a note against C, directing him to collect it, and apply the amount received for the benefit of D, and died some weeks afterwards. Where a delivery is made to a third person for the use of a donee, such third person must retain the

Parcher v. Saco & Biddiford Sav. Bk. (Me.), 3 N. Eng. Rep. 239.

[47] Thus where a person *in extremis* takes a package of bonds or other property from its place of security, and hands the same to another, saying that they or it is for him, this will be a valid gift *mortis causa*. See Vandor & Roach, 73 Cal. 61, 15 Pac. Rep. 354. In Darland v. Taylor, 52 Iowa, 503, the holder of certain notes destroyed them, saying she did not think she should live long, and did not want their maker to pay them; during her last sickness she said she had destroyed the notes, so that their maker would get the property for which they were given. The court held that there was a valid gift *causa mortis* of the amount of the notes. But in Basket v. Hassell, 107 U. S. 602; Bk. 27 L. Ed., where a certificate of deposit was indorsed: "Pay to Martin Basket, of Henderson, Ky., no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. Chaney," and delivered to the donee. The court held that it was not a valid *donatio mortis causa*, because it was to take effect only upon the death of the donor.

[48] 5 Bush. (Ky.) 591.

[49] Michener v. Dale, 23 Pa. St. 59; Kibly v. Godwin, 2 Del. Ch. 61; Caldwell v. Renfrew, 33 Vt. 213; Phipard v. Phipard, 55 Hun (N. Y.), 439, 29 N. Y. St. Rep. 294; 8 N. Y. Supp. 728; Connor v. Root, 11 Colo. 183, 17 Pac. Rep. 773; Shackleford v. Brown, 89 Mo. 546; Beales v. Crowley, 59 Cal. 665; Barclay's Estate, 11 Phila. (Pa.) 123; Price v. Boston Five Cent Sav. Bk., 129 Mass. 425, 37 Am. Rep. 371; Kemper v. Kemper, 1 Duv. (Ky.) 401; Brown v. Brown, 18 Conn. 410; Borneman v. Slidinger, 3 Shep. (Me.) 429; Wells v. Tucker, 3 Binn. (Pa.) 366; Moore v. Darton, 7 Eng. L. & Eq. 134.

[50] In Wilcox v. Matteson, 53 Wis. 23, 40 Am. Rep. 754, several hours before the death of W he stated to the nurse in attendance upon him, that his pocket-book was "under the bed, just under his shoulders," and requested her to "take it and give it to his wife when she comes." Nothing was done towards complying with the request until some hours after W's death, when his body was moved and the nurse took the pocket-book from the place described and handed it to another person to give to the widow of the deceased if she should come, and otherwise to be sent to her. The court held that this was not a valid gift *mortis causa* for want of sufficient delivery. The rule requiring actual delivery or its equivalent to give effect to a gift as a *donatio mortis causa*, was applied by the Supreme Judicial Court of Massachusetts in the case of McGrath v. Reynolds (116 Mass. 566) where one in expectation of death gave M a written instrument as follows: "I give to M, $5,758, to be divided as follows," etc., and handed to him two savings-bank books with orders for payment of the deposits, but added that the residue was in his trowser's pocket, turning in his bed and looking towards the closet where the trowsers were, and that E, the owner of the house, would give it to M.

[51] Trenholm v. Morgan, 28 S. C. 268, 5 S. E. Rep. 721.

[52] 11 Colo. 183, 17 Pac. Rep. 773.

[53] 4 Md. Ch. Dec. 149.

possession and control of the thing given up to the time of the death of the donor.[54] Any person who could be appointed a trustee, and is competent to execute the trust imposed, may be made a trustee to receive the property given, and hold it for the benefit of the donee, or donees, such as the husband,[55] the wife,[56] a child,[57] a servant,[58] the executor[59] of the donor, or to another person.[60] In a case where property is delivered to a third person in trust for the donee, acceptance by such donee is not necessary to make the gift valid,[61] for the acceptance of a beneficial gift is presumed by law.[62]

6. *Delivery to some one in Trust for the Donee to be Delivered after Donor's Death.*—The delivery of property, in the apprehension of death to a third person for the benefit of another, with direction to retain it until the death of the donor, and then to deliver it to the donee, or donees, as specifically directed, either by parol at the time of the delivery, or by a written instrument accompanying the delivery, and on such donor's death the thing is delivered to the donee or donees by such trustee and accepted by him or them, these circumstances constitute a valid *donatio mortis causa*;[63] but if the thing is not delivered by such third person as directed by the donor, the gift fails. Thus, where before death, an intestate gave a box containing notes, to his daughter, to be opened on his death, and divided between "you children," and surrendered the key to her, which she delivered to her husband, and after the death of the intestate she took the box and did not divide the notes as directed, but turned box and notes over to the administrator, it was held that this was not such a delivery as to constitute a gift.[64] And a delivery of promissory notes and other evidence of indebtedness, by

[54] Borneman v. Sidlinger, 3 Shep. (Me.) 429. Where A, in her last sickness, and in anticipation of her approaching death, delivered to B a promissory note, which A previously took from C, together with a mortgage of real estate to secure the payment of the note, A intending such delivery as a *donatio casua mortis*, and B receiving it as such, it was held to be a good and valid gift as intended, although the mortgage deed was not mentioned at the time of the delivery of the note, and remained in the hands of A until her death.

[55] Caldwell v. Renfrew, 33 Vt. 213.

[56] It is said by the Supreme Court of Pennsylvania in Wells v. Tucker, 3 Binn. (Pa.) 366, that a bond may be *donatio causa mortis* if given by a man, in his last sickness, to his wife, for the use of a third, person; that such delivery is sufficient, and that the wife is a competent witness of such gift.

[57] In Kemper v. Kemper, 1 Duv. (Ky.) 401, a person in his last illness, executed a writing attested by two subscribing witnesses, in which the names of several of his children and grandchildren were written, to whom he gave his estate, consisting principally of money and cash notes, with the amount each one was to have set opposite to his or her name, and delivered the paper to his two sons to keep, and the property also, and charged them with the execution of the trust. The court held that this was a valid *donatio causa mortis*.

[58] Moore v. Draton, 7 Eng. L. & Eq. 134.

[59] In Barclay's Estate, 11 Phila. (Pa.) 123, a testator, before his death, delivered to one of the executors named in his will a sum of money to be distributed among his servants, for whom he said he had neglected to provide. The executor notified some of the servants of the gifts to them, and paid them after the decease of the testator. The court held this a valid *donatio causa mortis*.

[60] See Beales v. Crowley, 59 Cal. 665; Shackleford v. Brown, 89 Mo. 546.

[61] Forbes v. Jason, 6 Ill. App. 395.

[62] Stone v. Haskett, 28 Mass. (12 Gray) 227; Borneman v. Sidlinger, 15 Me. 429; Noble v. Smith, 2 Johns. (N. Y.) 52; Picot v. Sanderson, 1 Dev. (N. C.) L. 309; Viet v. Viet, 34 Up. Can. Q. B. 104; Kerr v. Read, 23 Grant Ch. (Ont.) 525; Tancred v. O'Mullin, 3 Oldright, N. S. (Nov. Sco.) 145; Walker v. McBride, 2 Huds. & Br. (Irish) 215; Hooper v. Goodwin, 1 Swanst. 485. Thus a gift to an infant or a lunatic is valid although neither are capable in law of accepting: De Levillian v. Evans, 39 Cal. 120; Rinker v. Rinker, 20 Ind. 185.

[63] Woodbine v. Woodbine, 123 Ill. 608, 14 N. E. Rep. 58; 16 N. E. Rep. 209; reversing 23 Ill. App. 289; Baker v. Williams, 34 Ind. 547; Waring v. Edmonds, 11 Md. 424; Sessions v. Moseley, 7 Cush. (Mass.) 87; Walter v. Ford, 74 Mo. 195, 41 Am. Rep. 312; Nelson v. Sudick, 40 Mo. App. 341; Trorlicht v. Weizenecker, 1 Mo. App. 482; Sanborn v. Sanborn, 65 N. H. , 18 Atl. Rep. 233; Williams v. Guile, 117 N. Y. 343, 22 N. E. Rep. 1071; 27 N. Y. St. Rep. 251; 6 L. R. A. 366; Trenholm v. Morgan, 28 S. C. 268, 5 S. E. Rep. 721; Gass v. Simpson, 4 Cold. (Tenn.) 288. Where one, shortly before his death, places in the hands of another a sum of money to be held by the latter and invested for the benefit of the donor's children, there is a sufficient delivery to constitute a valid gift *causa mortis*. Nelson v. Sudick, 40 Mo. App. 341. And it is said in the case of Gass v. Simpson, 4 Cold. (Tenn.) 288, that where one about to flee from home to escape the rebel conscription, delivered certain notes and moneys to the donee's mother, to go to him as a gift in case the donor should never return, and enlisting in the union army, died without returning, it was a valid gift *causa mortis*. See also to same effect Baker v. Williams, 34 Ind. 547. In Williams v. Guile, 117 N. Y. 343, 27 N. Y. St. Rep. 251; 22 N. E. Rep. 1071; 6 L. R. A. 366, a bill of sale was executed to his niece shortly before his death, by an intestate who had previously had two strokes of paralysis, containing a clause empowering him to revoke the transfer at any time during his life, the instrument and the subject-matter thereof being delivered to his attorney, who, after his death, delivered them to the niece, and the court held it a gift *causa mortis*, declaring that the transaction showed a clear intent that the niece should have the benefit of the gift unless revoked during his life.

[64] Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819.

way of bailment to a third person to deliver to a donee is said not to be sufficient.[65] Neither will it be if the donor retains control over the gift, for then the holder is to be regarded as the agent of the donor, and his possession is the donor's possession, and there will not be a sufficient delivery.[66] A delivery to a third person for the donee, to be delivered after the donor's death, of the promissory note[67] or check[68] of such donor, is not valid to transfer the money represented by such note or check, because the delivery of such instrument is merely the delivery of the donor's promise, and not the delivery of the thing sought to be given. But in the case of Woodburn v. Woodburn,[69] where, at the making of a will the testator gave a note to one named as his executor, to be given to the maker of the note if he did not contest the will, and, if he did, to be collected and paid to the testator's widow, and the testator never assumed possession of the note, though the widow put it among his papers, the court held that the gift was a valid gift *causa mortis*. The rule that to render the gift good, one must be in apprehension of death is inflexible. Hence, where one not in the apprehension of death, delivers a thing to another, to be given to a third, when the depositary shall see him, whether the donor live or die, the authority of the depositary to deliver the thing will be revoked by the death of the donor, unless it be previously delivered to and accepted by the donee.[70] The rule requiring delivery of the thing given to constitute a valid *donatio mortis causa*, it seems, is not satisfied where there was a prior possession in the donee as bailee of the donor;[71] thus in McCord v. McCord,[72] the Supreme Court of Missouri held, that there was not a valid gift *causa mortis* for want of a proper delivery, where a father, about a week before his death, put a package of money into the hands of his son to take care of for him, and some three days before his death told his son, in case he should not recover, to pay the funeral expenses and divide the balance between himself and certain of his brothers and sisters.[73]

7. *Continuous Change of Possession.*—An absolute delivery alone is not sufficient to constitute a valid gift *causa mortis*. There must also be an actual and continued change of possession from the time of the gift until the death of the donor.[74] The donor must part with all dominion and control over the thing given, so that no further act of his, or of his personal representative, is necessary to vest the title perfectly in the donee, to belong to him presently as his own property, in case the donor shall die of his present illness, or from the impending peril, without making any change in relation to the gift, leaving the donee surviving him.[75]

8. *Delivery by Delivering means of Obtaining Possession.*—We have already seen that an actual delivery to, and a retention of the possession by the donee is necessary to a perfect gift *causa mortis;* yet that delivery need not consist, in all cases, of the actual and manual delivery of the thing given, but simply of the means of getting possession of and enjoying the thing given.[76] Thus it has been

[65] Shackleford v. Brown, Mo., 5 West. Rep. 440.

[66] Barnes v. People, 25 Ill. App. 136.

[67] Bowers v. Hurd, 10 Mass. 427; Sanborn v. Sanborn, N. H., 18 Atl. Rep. 233; Hemor v. More, 8 Ohio St. 239.

[68] Walter v. Ford, 74 Mo. 195, 41 Am. Rep. 312; Trorlich v. Weizenecker, 1 Mo. App. 482.

[69] 123 Ill. 608, 14 N. E. Rep. 58; 16 N. E. Rep. 209; reversing 23 Ill. App. 289.

[70] Sessions v. Moseley, 7 Cush. (Mass.) 87. The courts, however, seem to have relaxed the rule in favor of soldiers, probably because the life they lead is one impending "peril." Thus in the case of Gass v. Simpson 4 Co d. (Tenn.), 288, where one about to flee from home to escape the rebel conscription, delivered certain monies and noted to the donee's mother, to go to him, as a gift in case the donor should never return, and, enlisting in the union army, died without returning, it was held to be a valid gift *causa mortis*. And in Baker v. Williams, 34 Ind. 547, a soldier, while at home on furlough, deposited a certain sum with a friend, who gave him a written agreement to return the money if the soldier should return alive; but if he should die, then the money should be paid to his infant sister. The soldier died leaving the sister and a brother his only heirs. The court held that the brother could not maintain a suit against his sister for one-half of the money received by her.

[71] See post "Previous Possession."

[72] 77 Mo. 166, 46 Am. Rep. 9.

[73] In Walsh's Appeal, 122 Pa. St. 177, 15 Atl. Rep. 470; 22 W. N. C. 258; 19 Pitts. L. J. 212; 1 L. R. A. 535, it was held not a complete *donatio causa mortis* where a depositor, during her last illness, delivered her savings bank book to a third person, saying that if she died her money was for her sister in Ireland.

[74] Daniel v. Smith, 64 Cal. 346; Dunbar v. Dunbar (Me.), 13 Atl. Rep. 578; Hatch v. Atkinson, 56 Me. 324; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Dickeschied v. Exchange Bank, 28 W. Va. 340; Henschely v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926.

[75] Dickeschied v. Exchange Bank, 28 W. Va. 340.

[76] Cutting v. Gilman, 41 N. H. 147; Phipard v. Phipard, 55 Hun (N. Y.), 439, 29 N. Y. St. Rep. 294; 8 N. Y. Supp. 728; Harris v. Clark, 3 Const. (N. Y.), 93,

said that where a testator, having taken out a life policy payable to himself and his executors, etc., deposited it in a safe deposit company, attaching thereto a statement that the policy was for the benefit of his children, and subsequently made the same statement to the children, to one of whom he delivered the key to the box, and directed the custodian to deliver such box to the child, whom he directed to take possession, the action on the part of the insured constituted a valid gift to the children.[77] And from Harris v. Clark,[78] it would seem that the delivery of any instrument which operated as an assignment, to the donee, of the funds of the donor in the hands of a third person would constitute a valid *donatio causa mortis*.

9. *Prior Possession and After-acquired Possession.*—The general rule is that there must be an actual or constructive delivery of possession at the time the gift is made,[79] and on this ground it has been held that a prior possession, or an after-acquired possession of the donee, though by the authority of the donor, is insufficient;[80] however, there are cases which seem to support a contrary doctrine.[81]

10. *Time of making Delivery.*—The general rule of law is that to constitute a valid *donatio mortis causa* there must be a subject capable of passing by delivery, and an actual delivery at the time of the alleged gift;[82] some of the cases, however, hold that delivery need not be simultaneous with the words of the donation, but may either precede or succeed them.[83]

11. *Delivery Coupled with a Trust.*—A gift coupled with a trust is valid, if the trust be faithfully carried out. Thus where the owner of a mortgage, who was sick, two months before her death handed it to an intimate friend, saying that she wished him to keep it and see that she was decently buried, and that what was left should be his, the transaction was held to be a gift *causa mortis*.[84]

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overruling Wright v. Wright, 1 Cow. (N. Y.) 598. See Miller v. Jeffress, 4 Gratt. (Va.) 472.

[77] Phipard v. Phipard, 55 Hun (N. Y.), 439, 29 N. Y. St. Rep. 294; 8 N. Y. Supp. 728.

[78] 3 Const. (N. Y.) 93.

[79] See *post* "Time of making delivery."

[80] Drew v. Hagerty, 81 Me. 231, 17 Atl. Rep. 63; 3 L. R. A. 230; McCord v. McCord, 77 Mo. 166, 46 Am. Rep. 9; French v. Raymond, 39 Vt. 623; Miller v. Jeffress, 4 Gratt. (Va.) 472. In McCord v. McCord, *supra*, a father about a week before his death, put a package of money in the hands of his son to take care of for him, and some three days before his death told his son, in case he should not recover, to pay the funeral expenses and divide the balance between himself and certain of his sisters. The court held that there was not a gift. And in French v. Raymond, *supra*, S, in anticipation of death said that she gave her uncle her money, and that it was all his. She died soon after. The uncle had from time to time received money from her, deposited it in the savings bank, and retained the bank-book in his possession. The court said that there was not a valid *donatio mortis causa*, as there was no evidence of the delivery of the book or money to the uncle at the time the gift was made.

[81] See Nicholas v. Adams, 2 Whart. (Pa.) 17. In Wing v. Merchant, 57 Me. 383, the testator, before his death, placed certain notes in the possession of his married daughter, for safekeeping. Subsequently, he told her that she might have the notes, but there was no formal delivery. He did not call upon her afterwards for small sums, on account of the notes, as he had previously been accustomed to do. The court held that the gift of the notes to the daughter was perfect and irrevocable. But this was evidently on the ground that it was a gift *inter vivos* and not that it was a *donatio causa mortis*, otherwise, or there would be a hopeless conflict between that case and the later one rendered by the same court of Drew v. Hagerty, 81 Me. 231, 17 Atl. Rep. 63; 3 L. R. A. 230. In a New York case (Champney v. Blanchard, 39 N. Y. 111) C, about a month before her death, deposited a sum of money with B, and took his receipt therefor. On the morning of the day of her death, she handed the receipt to B at her bedside, saying that she gave that to him; she also mentioned the amount at the foot of the paper, saying that she gave B that amount. The court held that the transaction amounted to a valid gift *mortis causa*. And in the case of Stevens v. Stevens, 5 T. & C. (N. Y.) 87, 2 Hun (N. Y.) 470, S, who owned two notes, permitted her husband to transfer the larger one to H, as collateral security for his debt, and the other note was in a bureau drawer in the house where he and she lived, and, a day or two before she died, S said to her husband: "You may have all the money," but no money was delivered, and S owned no money or property, except the notes and some household furniture. The court held that a gift of the note was intended; that the larger note was not constructively or actively in the possession of the husband, and did not pass as a gift *causa mortis* but that the smaller one was in his possession and did so pass.

[82] Egerton's Exrs. v. Egerton, 2 Green (N. J.) 419; Cutting v. Gilman, 41 N. H. 147; French v. Raymond, 39 Vt. 623.

[83] Carradine v. Carridine, 58 Miss. 286, 38 Am. Rep.

[84] Jayne v. Murphy, 31 Ill. App. 28. In the case of Curtis v. Portland Savings Bank, 77 Me. 151, 52 Am. Rep. 750, at the direction of her aunt, four days before her death, the plaintiff took the aunt's saving-bank book, and the aunt said: "Keep this, and if anything happens to me, bury me decently and put up a headstone over me, and pay my debts, and anything that is left is yours." The court held this a valid gift with a trust. In Pierce v. Boston Five Cent Savings Bank, 129 Mass. 245, 37 Am. Rep. 371, in view of death, A delivered to B a sealed package containing a sum of money and savings-bank books, and a writing signed by him, stating where he wished to be buried, and directing that the balance, after paying all bills and expenses, should be divided among specified persons, at the same time telling B of the contents, and generally of the directions; and the court held it was a valid gift *causa mortis* in trust.

CHATTEL MORTGAGES — CHANGE OF POSSESSION—DESCRIPTION.

KOEHLER V. McCAMANT.

Supreme Court of Oregon, Nov. 27, 1893.

1. A mortgage of a stock of goods was filed as soon as made, and the mortgagees' agents, who occupied the other side of the same building as the mortgagor, took possession, and put in charge a man who hired the mortgagor to help him, as clerk. New books were opened, and all moneys received, after payment of running expenses, were applied on the mortgage debt. The mortgagor's name on the window was not erased: Held, that there was a change of possession, as against subsequently attaching creditors.

2. The return of the mortgagor's assignee, to whom the stock of mortgaged goods was turned over by consent, showing that he sold more articles of some kinds than were described in the mortgage, does not show that the description in the mortgage was inadequate as against subsequently attaching creditors, there being no averment or proof that the mortgagor had any goods other than those described in the mortgage.

LORD, C. J.: The object of this proceeding, is to determine the order in which the proceeds of the sale of certain property, made under an assignment for the benefit of creditors, shall be distributed. The facts, in substance, are: That on the 28th day of May, 1891, B. W. Fisher, a music dealer of Portland, being indebted to Koehler & Chase, music dealers in San Francisco, made a promissory note, payable to their order on demand, and, to secure the payment of the same, executed and delivered a chattel mortgage on the stock of goods in his store, which was immediately filed in the proper office; and that Miller & Harper, as the agent of Koehler & Chase in these transactions, on the same day took possession of it, and put Mr. W. S. Geary in charge of the store and said stock of goods. That on the 1st day of June, 1891, the said B. W. Fisher made to the order of Wallace McCamant a demand promissory note for the sum of $500, upon which, on the second day thereafter, he began an action, and at the same time sued out a writ of attachment, and delivered the same to the sheriff, who attached the said stock of goods and took it into his possession. That subsequently, but on the same day, J. H. Robbins brought an action against the said B. W. Fisher on two promissory notes for $400 and $300, respectively, given by Fisher to him, and sued out a writ of attachment, under which the sheriff again attached the same stock of goods. That immediately thereafter Koehler & Chase placed a copy of their mortgage in the hands of the sheriff, with instructions to foreclose it. That McCamant and Robbins each recovered judgment in his respective action, and shortly thereafter Fisher made a general assignment for the benefit of his creditors. That thereupon the parties entered into a stipulation that the assignee should take possession of and sell the said stock of goods, and return the proceeds thereof into court, which being done, the assignee reported to the court that he was unable to determine the order of distribution of such proceeds, and prayed that the claimants should be required to come before the court, and have their priorities settled and determined. That upon the court so ordering, McCamant and Robbins answered separately, alleging that the mortgage was fraudulent and void as against their respective claims; that it covered different property from that sold by the assignee; that possession was not taken under it; and that the liens acquired by each of said attachments were the first liens on the property sold, and entitled to be first paid out of the proceeds of the sale. Upon issue being joined, the matter was referred to a referee, who found, in effect, that the mortgage was valid and a first lien on the property, which finding the court sustained, and rendered a decree in accordance therewith, from which this appeal has been taken. The appellants contend that there was no such change in the possession of the property as the law contemplates, and, as a consequence, that the mortgage was not valid as to attaching creditors. It is shown by the evidence that Fisher occupied, with his stock of goods, one side, and Miller and Harper, with their stock of goods, the other side, of the same store building; that Fisher, as already stated, gave to Koehler & Chase the chattel mortgage in question, prepared in the common form, and that the same was immediately filed. Upon the assumption, probably, that the retention of the stock of goods by the mortgagor might induce other creditors to raise some question as to the validity of the mortgage, Miller & Harper' as agents of Koehler and Chase, took possession of the said goods, and put Mr. Geary in charge, who hired Fisher to assist him, as clerk. New books were opened, in which to keep an account of the business, and all moneys received on sales (no credit being given) were applied to the indebtedness of Koehler & Chase, except such amount as was applied in payment of necessary running expenses. The stock was not replenished, except, perhaps, by the purchase of a few strings, and the receipt of some few goods which had been ordered prior to the date of the mortgage. As a business sign, Fisher's name was lettered on the window, which was not erased therefrom when he delivered the possession of his stock of goods to the agents of Koehler & Chase. The fact that Fisher served as clerk after Mr. Geary was put in possession of and assumed control over the goods and business, under these circumstances is relied upon to show that there was no actual change of possession. There are cases, without doubt, which hold that it is not generally competent for a mortgagee to leave the goods mortgaged in the possession of the mortgagor as his agent, or to make the clerk of the mortgagor his agent to sell them, without any announcement or sign of a change of ownership, as the cases cited by counsel indicate. Stelle v. Benham, 84 N. Y. 634; Doyle v. Stevens, 4 Mich. 87. These cases consider that possession under such circumstances is merely constructive or legal,

and does not import that actual change of possession which the statute contemplated. The relevancy of this principle depends upon the facts to which it is to be applied. We may premise that it is not necessary that the mortgaged goods must be delivered to the mortgagee in person, but that delivery to a third party as his agent is equally effective as constituting an actual change of possession. In the case at bar, neither the mortgagor nor his clerk was left in the possession of the goods as agent for the mortgagees, but a third party, as their agent, took possession of such goods, and remained in the continued possession of the same until ousted by the sheriff under the attachment proceedings. There is a marked difference, as indicating a change in the possession of the property, between a mortgagee, or a third party as his agent, taking possession of mortgaged goods, and such mortgagee leaving the same in the possession of the mortgagor or his clerk as such agent. In the nature of things, when there has been delivery of the mortgaged goods, and an acceptance of them by a third party of such agent, his possession, so long as it continues, is actual and exclusive for the mortgagee. Nor is it necessary that there should be any removal of the goods to indicate such change of possession; for the taking of possession and assuming control over the property by such agent is an outward act, or visible sign, of an actual change of possession. Hence the possession of Mr. Geary as agent of Koehler & Chase, was not constructive or legal, but imported an actual change of possession. This being so, the mere fact that the mortgagor, Fisher, was employed as clerk, did not oust the mortgagees of their possession, or operate to restore the possession to the mortgagor; for, certainly, if they were in possession, or Mr. Geary as their agent, the fact of his employment is not an *indicium* of ownership, and does not constitute such a concurrent possession as the law condemns. In such case his employment in the capacity of a clerk indicates the changed relation he occupies to the property. The case of Wilcox v. Jackson, 7 Colo. 525, 4 Pac. 966, relied upon, is not in conflict with this principle, upon its face. There the mortgagee, not intending to devote his time to the business placed in charge a clerk of the firm that gave the chattel mortgage, who remained in possession and assumed control over the goods and business, so that his appearance indicated no change. If the mortgagee himself had taken charge of the goods and business, or by some third party as his agent, the change in his possession would have been visible, and accompanied with the usual *indicia* of ownership, although he might employ a clerk of the firm to assist him in the management of the business. But here Mr. Geary was openly placed in charge and carried on the business, which he could not do without causing a visible change in the possession of the property. His appearance in the store, and management of the concern, under such circumstances, indicated that the goods had changed hands,—that there was an actual and visible change of the possession, such as would apprise the community or the creditors of the mortgagor of such change. We do not think, therefore, the fact that the mortgagor was employed as clerk in the store, notwithstanding the omission to erase his name from the window, which the evidence indicates was an oversight, can be taken as conclusive evidence of fraud, or justify us in finding fraud, when the *bona fides* of the indebtedness is unquestioned, when the chattel mortgage was regular in form, and duly filed in the proper office before either appellant took any steps to reduce his claim to a judgment, and prior to Mr. McCamant obtaining his note, and when the possession taken and maintained was open and actual, and, in our judgment, sufficient to give notice to all concerned.

The next contention is that the description of the property in the mortgage is insufficient in law, as against the attaching creditors. This objection is based on the suggestion that the return of the assignee shows that he sold more articles of some of the kinds described than the inventory specified. But there is no evidence to sustain such suggestion. The mortgage undertakes to cover all the goods in the store, and to enumerate them in the inventory attached. It may be true that there were some articles of the stock omitted by mistake from the inventory, and to that extent, if we assume the return to be correct and to differ from such inventory, there would be a discrepancy between the return and the articles mentioned in such inventory. But, if this were so in fact, there is no evidence of it. The mortgagees took possession of the store and the goods contained therein, which the mortgage purports to cover, and to describe by enumeration all the various articles. The assignee sold the stock, and returned the proceeds into court for distribution. The evidence shows that the stock of goods he sold is the stock mortgaged. There is no evidence to show there was any discrepancy, or that the mortgagee had any other goods in the store than those specified in the mortgage. If there was, the report of the assignee or his inventory should have been submitted in evidence, and shown to be correct. Without such showing, we cannot assume his inventory is absolutely correct, or consider it for the purposes suggested. He is as liable to make mistakes as were the parties who made the inventory attached to the chattel mortgage. The necessity, therefore, for the proof of the facts upon which the suggestion is based, is too obvious for any further comment. There is no evidence, nor is there any claim, that Fisher had other property than the goods in the store and in controversy. We conclude, therefore, that the goods described in the mortgage was the same stock of goods which the mortgagee took possession of, and which the assignee sold. From these views it results that the decree must be affirmed.

NOTE.—It is the principle of the common law that where a chattel mortgage is silent as to the possession

of the property the mortgagee is entitled to immediate possession upon the execution of the mortgage. Broadhead v. McKay, 46 Ind. 595; Hickman v. Perrin, 6 Caldw. (Tenn.) 135; Robinson v. Fitch, 26 Ohio St. 659. Where the mortgage does not provide that the mortgagor shall retain possession, the mortgagee of personal property, may, if he can take posesession of it peaceably, retain it until satisfaction of the mortgage, unless other liens have attached to it while in the possession of the mortgagor. Whistler v. Roberts, 19 Ill. 274. Still it is quite customary to stipulate that the mortgagor shall retain the possession until default or until the mortgagee shall deem himself insecure. And it seems to be the doctrine of the later English and American cases that when this is done where the chattels are capable of mutual transfer a presumption of fraud arises as respects creditors and other third parties, but this presumption can be rebutted by evidence showing the transaction to have been fair and honest and disclosing a proper reason for retention of possession by the mortgagor. Alton v. Harrison, L. R. 4 C. A. 622; Martindale v. Booth, 3 B. & Ad. 497; Kleine v. Katzenberger, 20 Ohio St. 110; Watson v. Williams, 4 Blackf. (Ind.) 26; Brunswick v. McClay, 7 Neb. 137; Collins v. Myers, 16 Ohio, 547; Peck v. Land, 2 Kelly (Ga.), 1; Curd v. Miller, 7 Gratt. (Va.) 185; Frost v. Mott, 34 N. Y. 253; Swift v. Hart, 12 Barb. (N. Y.) 530. In Vermont, a chattel mortgage not accompanied by a change of possession is inoperative and void as against creditors of the mortgagors. Russell v. Fullmore, 15 Vt. 130; Sturgis v. Warren, 11 Vt. 433. Although a mortgagor retains possession, the mortgage will not for that reason be void as between the parties. The only question is as to its validity against subsequent purchasers and *bona fide* creditors. Morrow v. Turney, 35 Ala. 131; Hackett v. Manlove, 14 Cal. 85. As the principal case teaches, possession under a chattel mortgage, to be effectual must be actual and not merely constructive. Crandall v. Brown, 18 Hun (N. Y.), 461. As to symbolical delivery, see Fry v. Miller, 45 Pa. St. 441; Luckenbach v. Breckenstein, 5 Watts & S. (Pa.) 145; Morrow v. Reid, 30 Wis. 81; Holmes v. Crane, 2 Pick. (Mass.) 607. Where only symbolical delivery of mortgaged chattels can be made and they are left where the right of possession is uncertain, doubts must be decided in favor of creditors and against the mortgagee. Anderson v. Brenneman, 44 Mich. 198. Where a firm of which the mortgagor is a member, is in the use of mortgaged chattels, an agreement between the mortgagor and mortgagee after default in payment that a partner of the former shall retain possession of the property for the latter, the property remaining and being used as before, does not work a change of possession. Mere words will not effect a change in law when there is none in fact. Porter v. Parmlee, 52 N. Y. 185. Where the property embraced in a bill of sale consists of barrels of whisky and they are merely marked by the creditor's agent with a cross and the creditor's name, and moved from their possession in the debtor's warehouse out into the middle of the room, there is no delivery within the provision of Comp. Stat. Div. 5, Gen. Laws, ch. 92, that no mortgage of goods shall be valid as against the rights of any other person than the parties thereto, unless accompanied by delivery. Story v. Cordell (Mont.), 33 Pac. Rep. 6.

A chattel mortgage on a stock of goods reserving to the mortgagor the right to continue in possession and to sell the goods and replenish the stock in the ordinary course of business from time to time with no provision that the proceeds of sales shall be in any way applied in reduction or discharge of the mortgage debt is generally held fraudulent and void as to creditors, both in respect to the original stock and to additions thereto. Ranlett v. Blodgett, 17 N. H. 298; Russell v. Winne, 37 N. Y. 591; Yates v. Olmstead, 65 Barb. (N. Y.) 43; Joseph v. Levy, 58 Miss. 843; Reiser v. Peticolas, 50 Texas, 638; Martin v. Ogden, 41 Ark. 186; Simmons v. Jenkins, 76 Ill. 479; Lodge v. Samuels, 50 Mo. 204; Stynart v. Deuster, 23 Wis. 136; Horton v. Williams, 21 Minn. 187; Orton v. Orton, 7 Oreg. 478. But in several of the States the opinion prevails that such a transaction is not void on its face though it may afford a presumption of fraud. Lister v. Simpson, 38 N. J. Eq. 438; Cheatham v. Hawkins, 76 N. Car. 335; McLaughlin v. Ward, 77 Ind. 383; Morris v. Stern, 80 Ind. 227; Clark v. Heiman, 55 Iowa, 74; People v. Bristol, 35 Mich. 28. In any event, suffering property covered by a chattel mortgage to remain in the hands of the mortgagor after default is a fraud *per se* and not open to explanation. Reid v. Eames, 19 Ill. 594; Wilson v. Rountree, 72 Ill. 570.

The following are some late cases upon the subject of possession by a mortgagor:

A chattel mortgage upon a saw mill and other property provided that it should also be a lien upon other property of the same or similar kind, which during the existence of the debt should be substituted by the mortgagor to apply any breakage, loss, or waste. It was held that this provision did not confer on the mortgagor a general power of sale and that the mortgage was not constructively fraudulent as being to the use of the mortgagor. Jennings v. Sparkman, 48 Mo. App. 246.

A chattel mortgage provided that it should cover "any and all goods that may be purchased from time to time to replace goods sold that are covered by this mortgage." There was no provision as to what should be done with the proceeds, nor any agreement outside the mortgage limiting the sales or providing for the proceeds. It was held that the mortgage was void as against the creditors of the mortgagor, and was not rendered valid by the mortgagee taking possession of the property without the consent of the mortgagor, under a clause authorizing him to do so whenever he deemed himself insecure. Rathbun v. Berry, 31 Pac. Rep. 679.

A mortgage of a stock of goods, whereby the mortgagor reserves to himself the right of continuing in possession and to sell the goods, is not void as to creditors where at the time of executing the mortgage he was solvent. Thornton v. Cook (Ala.), 12 South. Rep. 403.

A recorded mortgage, covering both real and personal property, is not invalidated as to the personalty by the fact that the mortgagor is to retain possession of such property until default, since the recording of the mortgage, as permitted by statute, must be regarded as a substitute for change of possession. Cooper v. Berney National Bank (Ala.), 11 South. Rep. 760.

A mortgage of a stock of merchandise not recorded, which by its terms permits the mortgagor to retain possession and sell the stock without restriction, and which contains no requirement that the proceeds, shall be used in the payment of the mortgage debt, or that any accounting shall be made for the proceeds, operates as a fraud on the creditors of the mortgagor, and is void. Chapin v. Jenkins (Kan.), 31 Pac. Rep. 1084.

CORRESPONDENCE.

INTERVENTION IN COLLUSIVE LITIGATION.

To the Editor of the Central Law Journal:

Can a party intervene in a pending cause where he proposes to allege that the existing or pending litigation is collusive or fraudulent? And would a party who failed to intervene in such case, though invited, as in the case of a creditor in a foreclosure proceeding be precluded by a decree of foreclosure? Stout v. Lye, 103 U. S. seems to be conclusive.

LAWYER.

WILL POSSESSION BY TENANT SUPPORT SUIT TO QUIET TITLE.

To the Editor of the Central Law Journal:

Referring to your Vol. 38, No. 1, p. 12, question "will possession by tenant support suit to quiet title?" We, in New Jersey, have a statute respecting the quieting of titles to land (Rev. 1189), which reads: "That when any person is in peaceable possession of lands · · · claiming to own the same and the title thereto · · · is denied or disputed · · · it shall be lawful to bring suit in chancery, etc. Held in 9 C. E. Green (24 N. J. Eq.) p. 178-180, that where tenant was in possession lessor would be considered as in peaceable possession," and could maintain his bill. This may throw some light on the query of your correspondent.

W. M. C. AND L. A. R.

STATUTORY LIEN UPON GRAIN FOR SERVICES.

To the Editor of the Central Law Journal:

Answering query in 38 Cent. L. J. p. 12, I beg to say that a cook has a statutory lien upon grain for services. Young v. French, 35 Wis. 111; Winslow v. Urquhart, 39 Wis. 260.

B. K. W.

FALSE PRETENSES IN THE PURCHASE OF MERCHANDISE.

To the Editor of the Central Law Journal:

In an article published in number 21 of the current volume of the CENTRAL LAW JOURNAL, entitled "False Pretense In the Purchase of Merchandise," signed by Mr. Percy Edwards, I find the following on page 414: "In Illinois, in order to proceed against a fraudulent buyer by an order of arrest in a civil case, the statements relied upon to show the false pretense must be in writing." This is evidently an error, as appears from the context. The writer evidently meant a criminal case rather than a civil case. Section 97 of the Criminal Code of Illinois provides for the offense of obtaining credit by any false representation in writing signed by a party, of his own respectability, wealth, or mercantile correspondence or connections. This offense must be prosecuted by indictment, but an order of arrest in a civil case may be had upon the designedly false representations of the buyer made to the vendor. This offense is covered by section 1 of the Bail Act, Chap. 16, Revised Statutes of Illinois; but for the purpose of procuring an attachment against property the debt sued for, if fraudulently contracted on the part of the debtor, it must so appear by the statements of the debtor, his agent or attorney, reduced to writing, with his signature attached thereto, or that of his agent or attorney. It would seem therefore, that in Illinois the person of a debtor may be arrested for making oral false representations as to his financial responsibility, while his property cannot be attached except the false representations are reduced to writing. This is an instance where the property of the fraudulent debtor is less liable to attack than his person.

ADOLPH MOSES.

BOOK REVIEWS.

PERLEY'S LAW OF INTEREST.

This a most important book especially to the commercial lawyer. It discusses the principles of the law of interest as applied by courts of law and equity in the United States and Great Britain and also gives the text of the general interest statutes in force in the United States, Great Britain and the Dominion of Canada. For some reason little attention has been given by text writers to this important branch of the law. There are many interesting problems pertaining to it and upon many questions there is a diversity of opinion among the courts. The present volume is therefore timely. It treats in detail of Contractual Interest, Interest allowed as Damages, How Interest is Barred, Rate of Interest, Compound Interest, Conflict of Laws and Usury. The author seems to have given the subject careful study and conscientious research. The text is well prepared and the citation of authorities extensive. The book has nearly five hundred pages, mechanically well executed and is published by Geo. B. Reed, Boston.

BOOKS RECEIVED.

A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors, with an Appendix of Forms. By Alexander M. Burrill, Author of a Law Dictionary and Glossary, a Treatise on Circumstantial Evidence, a Treatise on Practice, etc. Revised and Enlarged by James L. Bishop. Sixth Edition Revised and Enlarged and an Appendix of State Statutes added by James Avery Webb, of the Memphis, Tennessee, Bar. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau Street, 1894.

The Annual on the Law of Real Property, being a Complete Compendium of Real Estate Law, embracing: All Current Case Law, Carefully Selected, Thoroughly Annotated and Accurately Epitomized; Comparative Statutory Construction of the Laws of the Several States; and Exhaustive Treatises upon the most Important Branches of the Law of Real Property. Edited by Tilghman E. Ballard, Emerson E. Ballard, author of "Ballards' Real Estate Statutes of Indiana," "Ballards' Real Estate Statutes of Kentucky," "The Ohio Law of Real Property," and Editors, with Mr. Thornton, of "Thornton & Ballards' Annotated Indiana Practice Code." Vol. 2, 1893. Crawfordsville, Ind. The Ballard Publishing Co.

The Law of Strikes, Lockouts and Labor Organizations. By Thomas S. Cogley, a Member of the Bar of the District of Columbia, and author of Cogley's Digest. Washington, D. C.: W. H. Lowdermilk & Co., 1894.

HUMORS OF THE LAW.

Judge—"What is your age?"

Female witness hesitates.

Judge—"Don't hesitate in answering the question. The longer you hesitate the older you'll be."

Professional Dignity.—He was ragged, and was evidently no friend of the barbers; but in spite of it all there was a certain pride in his deportment as he stepped into the police court room.

"Have you ever been arrested before?" asked the judge without looking at him.

"Have I? Aw come off, judge, don't rub it in. Do I look like an amateur?"

Judge—"I understand you to admit you stole this suit of clothes. Have you anything to say in mitigation of your offense?"

Prisoner—"Yes, your Honor. I had to go to the trouble and expense of having it altered before I could wear it."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATOR — Attorney's Compensation.—An attorney rendered services and made disbursements in successfully defending a claim against an estate under the mistaken belief of a contract with the administrator for such services, when in fact the minds of the attorney and administrator had never met: Held that the administrator was liable on an implied assumpsit for the services and disbursements, as he had taken the benefit of them, and that the attorney could recover on a *quantum meruit*.—MILLER v. TRACY, Wis., 56 N. W. Rep. 866.

2. ADMINISTRATION—Partial Distribution—Bond.—On a partial distribution of the assets of a decedent's estate, the court may require a refunding bond by the distributee, under the express provision of Rev. St. 1881, § 2380.—MAZELIN v. ROUYER, Ind., 35 N. E. Rep. 303.

3. ADVERSE POSSESSION— Vendor and Vendee.—Possession of land under a deed from one who holds merely a sheriff's certificate of sale does not begin to be adverse till expiration of the period of redemption from the sheriff's sale.—MORSE v. SEIBOLD, Ill., 35 N. E. Rep. 369.

4. APPEAL—New Trial.— Where the trial court has overruled a motion for a new trial the Appellate Court will not disturb such ruling unless it affirmatively appears from uncontradicted evidence that the facts established thereby, if stated in the verdict, would have authorized a judgment in favor of appellant.—CALTON v. LEWIS, Ind., 35 N. E. Rep. 301.

5. APPEAL— Question not Raised Below.—One who desires to have reviewed, upon petition in error in this court, alleged errors occurring at the trial, is required to assign the rulings complained of to the trial court, in a motion for a new trial.—UPTON v. CADY, Neb., 56 N. W. Rep. 881.

6. APPEARANCE—General or Special.—Where defendant appears, and asks relief which can be granted only on the hypothesis that the court has jurisdiction, the appearance is general, and he submits to the jurisdiction, but it is otherwise if the granting of the relief would be consistent with a want of jurisdiction; and therefore an appearance by defendants in attachment, who have not been served with process, to move to discharge the attachment for want of jurisdiction, on the ground that the action was brought in the wrong county, is not a waiver of process.—BELKNAP v. CHARLTON, Oreg., 34 Pac. Rep. 758.

7. ARBITRATION—Verbal Submission.—A verbal submission of the matters in controversy between parties who appear voluntarily, and testify themselves, and produce witnesses in support of their respective claims, will, if fairly conducted, be sustained after the making of the award.—GREER v. CANFIELD, Neb., 56 N. W. Rep. 883.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where, in the Probate Court, two assignments for the benefit of creditors—one executed by a partnership, and the other by one of the partners individually, to the same assignee, are being administered, it is proper for such court to treat the two as one trust, where necessary to the adjustment of the conflicting claims of creditors entitled to the trust fund.—CLAPP v. HURON COUNTY BANKING CO., Ohio, 35 N. E. Rep. 308.

9. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Attachment.—A creditor of an insolvent, who fails to file his claim with the assignee within the three months allowed for that purpose by Rev. St. 1891, ch. 10*a*, § 10, because he has attached certain property of the insolvents, has no right, after the attachment has been declared void, and the three months have expired, to file his claim *nunc pro tunc*, since the pendency of the attachment suit did not prevent filing the claim.—KEAN v. LOWE, Ill., 35 N. E. Rep. 350.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—Where the court commissioner who takes the bond of an assignee for the benefit of creditors fails to indorse on it his approval thereof, the assignment is void, and the assignee is liable to garnishment by creditors of the assignor.—CHARLES BAUMBACH CO. v. SINGER, Wis., 56 N. W. Rep. 873.

11. ATTORNEY AND CLIENT.—An instruction that "an attorney, while acting in that capacity, has no right to so conduct the business of his client that the attorney

may realize profits himself out of the transaction, other than his reasonable fees and charges," is too broad, since it requires the attorney to account for the profits of a joint venture with his client without regard to his good faith or the client's knowledge.—ROLFE v. RICH, Ill., 35 N. E. Rep. 353.

12. CARRIERS OF GOODS—Negligence—Warehousemen.—Plaintiff shipped corn by rail, consigned to himself, with directions to notify a certain party at the point of destination, on which party plaintiff had drawn for the corn, attaching the bill of lading to the draft. The drawee wrote plaintiff that he was not able to pay the draft on presentation, whereupon plaintiff made a second draft, on 10 days' time. The railroad company, in the meantime, had stored the corn with a warehouseman, taking a warehouse receipt therefor in its own name: Held, that the company's liability as common carrier ceased upon its delivery of the corn at warehouse, although it had failed to notify plaintiff of the drawee's failure to receive the corn, since the plaintiff had notice from the drawee, and there therefore remained nothing to be done to complete the contract of carriage.—GREGG v. ILLINOIS CENT. R. CO., Ill., 35 N. E. Rep. 343.

13. CARRIERS OF PASSENGERS — Tickets — Delayed Trains.—Plaintiff bought an excursion ticket from R to M and return, "via B. Branch," "not good to stop off *en route*." The road from R to B, where it was necessary to change trains, was the main line; and from B to M, the B Branch. On his return from M he would, if trains were on schedule time, have had to wait in the B station a half hour for a train to R. A half mile from B, however, his train had to wait to let a belated train pass. Plaintiff there left his train, and walked to B, getting there in time to board the belated train: Held, that his ticket was not good on this train, it not being a connecting train.—PENNSYLVANIA R. CO. v. PARRY, N. J., 27 Atl. Rep. 914.

14. CONSTITUTIONAL LAW—Special Laws.—Const. § 125, which discontinued a certain court, "as constituted and organized" under the constitution of 1850, and created another court to succeed it, did not repeal a special act regulating practice in the discontinued court, as the practice act was not a part of such court, "as constituted and organized."—PIPER v. GUENTHER, Ky., 23 S. W. Rep. 872.

15. CONSTITUTIONAL LAW—Toll Roads—Trial by Jury.—Sections 4914, 4916, and 4918 of the Revised Statutes, so far as they authorize the Probate Court to declare a turnpike road abandoned and vacated as a toll road, and thereby to become a free road, without the intervention of a jury, or the right of appeal, whereby such jury could be had to determine whether the road, or a part thereof, has been out of repair for the preceding six months, within the statutory meaning, are in conflict withthe constitution.—SALT CREEK VAL. TURNPIKE CO., Ohio, 36 N. E. Rep. 304.

16. CONTRACT—Building Contract—Certificate of Architect.—If a building contract merely authorizes an architect to certify that the contract is performed to his satisfaction, his certificate that it is not so performed because of certain defects in the work has no binding effect upon the contracting parties.—MACKINSON v. CONLON, N. J., 27 Atl. Rep. 930.

17. CONTRACT—Guaranty—Original Promise.—B an C had a contract for the construction of a school building, and sublet a part of the work to one J B and C and the P C Co. then entered into a verbal agreement, by the terms of which the P C Co. was to furnish J such material as he might need in said work, present the bills therefor to J, for his O. K., and thereupon B and C were to pay them: Held, an original promise on the part of B and C, and not a promise to pay J's debt.—BARRAS v. POMEROY COAL CO., Neb., 56 N. W. Rep. 890.

18. CONTRACTS—Public Policy.—It is no defense to an action for goods sold and delivered that plaintiff is a member of an illegal trust or combination to interfere with the freedom of trade and commerce, since the illegality of the combination is collateral to the contract of sale, and cannot taint it with illegality, or make it contrary to public policy.—NATIONAL DISTILLING CO. v. CREAM CITY IMPORTING CO., Wis., 56 N. W. Rep. 864.

19. CONTRACT — Sale — Balement.—A consignment of goods to the "care" of another, to be shipped to a foreign country, and there sold to the best advantage; any loss resulting from sale below the invoice price to be borne by consignors, and profits in excess thereof to be equally divided; consignee to bear expenses of shipment, and to return free of charge any goods not sold,—is not a contract of "sale or return," but a bailment; and the bailee's common-law exemption from liability for loss by inevitable accident is not changed, so as to render him absolutely liable, by his agreement to return the goods in case they are not sold.—STURM v. POKER, U. S. S. C., 14 S. C. Rep. 99.

20. CONTRACT—Variance.—A contract to teach school, which reserves to both parties the right, after the present school year has expired, to terminate the contract by giving three months' notice, "otherwise the foregoing contract will be binding for the ensuing scholastic year," cannot be terminated before the expiration of the first school year by giving the three-months notice.—VOSS v. FEURMANN, Tex., 23 S. W. Rep. 936.

21. CONTRACT OF SALE.—When a special contract is entered into for the sale and delivery of personal property, a substantial performance by the vendor is a condition precedent to his right of action against the vendee for the price of any part of the property delivered under the contract.—D. M. OSBORNE & CO. v. MARTIN, S. Dak., 56 N. W. Rep. 905.

22. CORPORATIONS—Assessment of Stock—Estoppel.—Where a corporation sold some of its stock for non-payment of assessments, and bid the same in, in which the stockholder acquiesced, it cannot on its own motion treat the sale as invalid, and reinstate the stockholder, so as to render him liable for the assessment.—PATTERSON v. BROWN & CAMPION DITCH CO., Colo., 34 Pac. Rep. 769.

23. CORPORATIONS—Pleading Corporate Existence.—Where the defendant is sued by a name indicating that it is not a natural person, but a company of some kind, the complaint must state that it is a corporation, or state facts showing that it is an artificial being, capable of being sued.—STATE v. CHICAGO, M. & ST. P. R. CO., S. Dak., 56 N. W. Rep. 894.

24. CORPORATIONS—Powers—Accommodation Paper.—A business corporation has no power to accept accommodation paper and the officers who cause it to make such acceptance are personally responsible to it for payments made or liabilities incurred in consequence thereof.—HUTCHINSON v. SUTTON MANUF'G CO., U. S. C. C. (Ind.), 57 Fed. Rep. 998.

25. COUNTIES — Contracts — Validity.—In a suit on county warrants issued pursuant to the orders of the county court, in compliance with the provisions of a valid contract for the erection of a court house, and for the precise amount which the county had agreed to pay, the county, in the absence of fraud in obtaining the contract, and of proof that the work was not done in compliance with the specifications, is not entitled to a deduction from the contract price, or to insist that the damages be assessed as upon a *quantum meruit* merely because the court house when completed was worth only one-third of the contract price.—THOMPSON v. SEARCY COUNTY, U. S. C. C. of App., 57 Fed. Rep. 1030.

26. COUNTIES — Printing of Tax List.—Printers who publish a delinquent tax list, and fail to make and transmit to the county treasurer the affidavit required by section 108, ch. 107, Gen. St. 1889, cannot recover pay for such publication from the county.—MORIARTY v. BOARD OF COM'RS OF MORRIS COUNTY, Kan., 34 Pac. Rep. 781.

27. COUNTY TREASURERS—Following Trust Fund.—A county treasurer, whose bond is conditioned that he shall faithfully perform the duties of his office, pay, according to law, all moneys which shall come into his hands as treasurer, render true account thereof whenever required by the commissioners or by law, and deliver to his successor, or any person authorized by law to receive them, all moneys, books, papers, etc., of his office, and whose statutory duty it is to receive all moneys belonging to the county, and pay them out only on the orders of the board, except where otherwise specially provided by law, is a trustee of an express trust.—MCCLURE V. BOARD OF COM'RS OF LA PLATA COUNTY, Colo., 34 Pac. Rep. 763.

28. CRIMINAL EVIDENCE—Declarations.—On a prosecution for assault and battery committed on a boy, while the statements made by him to his father on coming home wounded and crying are admissible as part of the *res gestæ*, his subsequent statements, made to a witness sent for by the father, are not thus admissible.—POOLE V. STATE, Tex., 23 S. W. Rep. 891.

29. CRIMINAL LAW — Felonies — Misdemeanor. — An offense that is a felony because it may be punished by imprisonment in the penitentiary is not, by reason of a less punishment being inflicted, reduced to a misdemeanor.—STATE V. MELTON, Mo., 23 S. W. Rep. 889.

30. CRIMINAL LAW—Indictment—Description of Person.—On trial of an indictment of "Carney Griffie" for petit larceny, second offense, the record of a previous conviction of "Carney Griffin" for petit larceny is inadmissible in evidence in the absence of an averment in the indictment of the identity of the persons and the difference in the names, as the names are not *idem sonans*.—STATE V. GRIFFIE, Mo., 23 S. W. Rep. 878.

31. CRIMINAL LAW—Murder—Principal and Accessory. —Under the statutes of this State, one who procures, counsels, or commands a criminal offense may be considered as principal, and may be punished as the principal, and it is not necessary to name such principal in the information or indictment.—STATE V. PATTERSON, Kan., 34 Pac. Rep. 784.

32. CRIMINAL LAW—Robbery—Evidence.—Upon trial for robbery, proof that the defendant assaulted the person named in the indictment, and took from his person by force a thing of value belonging to him, is sufficient for conviction without proof that anything specifically described in the indictment was taken, since such specific description need not have been inserted in the indictment. — BURKE V. PEOPLE, Ill., 35 N. E. Rep. 376.

33. CRIMINAL TRIAL—Witness. — Where only one of several defendants testifies, an instruction that while, under the law of the State, defendants in criminal cases are competent witnesses, yet their credibility is left to the jury; and, in considering the credit to be given to the testimony of L, the jury may consider his interest in the case, his desire to avoid punishment, and all other interests or motives that would likely affect the testimony of a person similarly situated,—is not objectionable as applying a different test to said defendant's credibility from that applied to other witnesses, or as calling attention to the fact that the other defendants did not testify.—DOYLE V. PEOPLE, Ill., 35 N. E. Rep. 372.

34. DECEIT—Fraudulent Representations.—A fraudulent representation that a tract of land is free and clear of incumbrances, and upon which another relies, and is induced to purchase the land, when in fact it is subject to a valid mortgage, is sufficient, upon which to base a recovery for the wrong and injury sustained, although the injured party might have discovered the incumbrance by a search of the public records.—CARPENTER V. WRIGHT, Kan., 34 Pac. Rep. 798.

35. DEED—Bona Fide Purchaser.—One who executes a deed in ignorance of its contents, and through the fraud of the grantor, is bound by her action, as against an innocent mortgagee, who advanced money to the grantee on the faith of the deed. — ELMENDORF V. JADA, Tex., 23 S. E. Rep. 935.

36. DEED — Delivery. — Complainant and defendant having agreed, in writing, for an exchange of lands, —conveyance to be made by deeds,—complainant laid his deed down on the table, before defendant, wh took it, and gave complainant his deed. Complainant, on finding that it was a special warranty deed, objected to it, and demanded a general warranty deed, which not being given, he demanded the return of his deed. There was a conflict in the evidence as to whether complainant had orally agreed to accept a special warranty deed: Held, that there was no valid delivery of complainant's deed. — MCDONALD V. MINNICK, Ill., 35 N. E. Rep. 367.

37. DEED—Reformation — Latent Ambiguity.—Where a deed describes the land by metes and bounds beginning at a certain corner of "section eight" in a certain county, without naming the township and range, and it appears that there are in said county several sections numbered 8, it may be shown by parol evidence in suit to reform the deed what section was intended, since the ambiguity is latent.—HALLADAY V. HESS, Ill., 35 N. E. Rep. 380.

38. DEED—Right to Mine Coal.—A deed of bargain and sale with words of inheritance granted certain lots, all gas from certain wells, and the perpetual right to mine and carry away coal from all the veins under certain land, the grantee to pay a royalty on all coal mined, there being, however, no condition or covenant requiring him to mine: Held, that an exclusive right to mine and carry away coal was not granted.—JENNINGS BROS. & CO. V. BEALE, Pa., 27 Atl. Rep. 948.

39. DOWER—Children by Former Wife.—Rev. St. 1881, § 2487, provided that if a man married a second or other subsequent wife, and had by her no children, but had children alive by a previous wife, the land which at his death descended to such wife should at her death descend to his children. Said section, as amended by Act March 11, 1889, provides that in such case the interest of such wife in the lands of decedent shall be only a life estate, and the fee shall at the husband's death vest in such children, subject only to said life estate. Section 2483 provides that one-third of a husband's realty shall descend to his widow in fee simple: Held, that the amendment to section 2487 does not override section 2483, so as to give the widow an estate in the whole of the realty, but she still takes only a third.—PEARSON V. PEARSON, Ind., 35 N. E. Rep. 288.

40. DRAINAGE — Establishment of Ditch. — Rev. St. 1881, § 4308, relates to the construction of public ditches extending into two or more counties under the authority of the board of county commissioners, and provides that the petition shall be filed with the auditor of the county containing the head or source of the ditch, and that the board of commissioners of such county shall appoint the time and place of the viewers' meeting: Held that, though the statute does not expressly state the court to which appeal lies, it must be to the court of the county whose board of commissioners is given original jurisdiction.—DENTON V. THOMPSON, Ind., 35 N. E. Rep. 264.

41. EJECTMENT—Evidence.—Where there is evidence tending to prove that, for more than 20 years, plaintiff's grantor, who claimed to own the land, exercised acts of ownership over it, by going upon the land from time to time, and cutting hay thereon, it is error to withdraw the case from the jury, since possession for 20 years is *prima facie* proof of title.—EDDY V. GAGE, Ill., 35 N. E. Rep. 347.

42. EMINENT DOMAIN — A landowner cannot enjoin the operation of a railroad over his land after he has permitted the company to build its tracks, and equip and operate the road, though he had had an assessment of damages, conditioned that until payment no title or right should vest in the company, and the latter took possession by force, and refused to pay the damages assessed.—MIDLAND RY. CO. V. SMITH, Ind., 35 N. E. Rep. 284.

43. EMINENT DOMAIN—Assessment of Damages.— In condemnation proceedings, to condemn for a city street a strip of land running through a tract of 90 acres belonging to defendant, it is error to instruct the jury that, in assessing damages to land not taken, they should set off special benefits caused by the proposed improvement, where it appears that the entire tract is covered by a pond used by defendant for cutting ice, and there is nothing to show in what way the city proposes to improve the proposed street, or that it will improve it at all, since there can be no benefit to the defendant's land not taken unless the proposed street is so improved as to be passable.—WASHINGTON ICE CO. v. CITY OF CHICAGO, Ill., 35 N. E. Rep. 378.

44. EMINENT DOMAIN—Damages.—Under Rev. St. §§ 881-912, providing that the jury in condemnation proceedings shall, in assessing the value of the land taken, examine the adjacent lands or any improvements, and, if injured, assess damages therefor, and any other damages sustained by the property owner, while an action for taking a portion of a lot and for injuries to the remaining real estate is pending, another action for injuries to the house situated thereon and annoyance to the occupants by the smoke and noise of the trains cannot be maintained.— REHMAN v. NEW ALBANY B. & F. R. CO., Ind., 35 N. E. Rep. 292.

45. EQUITY—Parol Lease. — Decedent made a parol lease of land to complainant, putting him in possession, taking the rent for the entire period, giving a receipt providing that, if either decedent or his wife desired, they might redeem from the lease by refunding the amount paid for the unexpired time. They having died without offering to redeem, decedent's administrator, in an action of ejectment, recovered the land, with damages for its detention: Held, that the complainant could maintain a suit in equity to be restored to possesion for the unexpired term.—TRAMMELL v. CRADDOCK, Ala., 13 South. Rep. 911.

46. EQUITY—Specific Performance.—A court of equity has jurisdiction on a bill to enforce a written contract whereby defendants have covenanted not to manufacture and sell any machines infringing certain patents claimed by complainants, and under which they are making and selling machines, since the continuance of such violation would tend to diminish complainants' profits in the business, for which mere damages, recoverable at law, would not be an adequate remedy. — AMERICAN BOX MACH. CO. v. CROSMAN, Mass., 57 Fed. Rep. 1021.

47. EQUITY JURISDICTION — Specific Performance — Claims against Decedents.—A father transferred property to his son in consideration of the son's agreement to support him during life. The son died first, having kept his agreement up to the time of his death. The property had been sold by the son, and its proceeds were not traced to the possession of his heirs and legal representatives: Held, that equity had no jurisdiction to enforce a specific performance of the agreement, the remedy at law being adequate.—CAMPBELL v. POTTER, Ill., 35 N. E. Rep. 364.

48. ESTOPPEL IN PAIS.—The holder of an adverse title to land, and those claiming under him, are estopped to set up such title as against defendant in ejectment, where such holder acted for defendant in soliciting another to convey to defendant, knew that defendant had purchased and paid for the land believing that the grantor had title thereto, saw defendant make extensive improvements on the land, and kept silent as to his own adverse claim.—WAHL v. PITTSBURG & W. RY. CO., Penn., 27 Atl. Rep. 965.

49. ESTOPPEL IN PAIS.— Where testator, who had received land by a will which permitted him to will it to his sons only, willed it equally to his sons and daughters, and the sons assented to the provisions of the will, accepted and received all rights thereby conferred on them, and united in an amicable parol partition, the sons, and those claiming under them, are estopped to deny the titles of the sisters to the parts allotted to them in the partition.—SPAULDING v. FERGUSON, Pa., 27 Atl. Rep. 945.

50. EVIDENCE—Contracts—Corporations.—J, the sole owner of all the stock in three street railway companies, made a contract with M, by which the latter was to buy a one-third interest, and J warranted the assets of the companies to be a certain amount, and the liabilities not to exceed a certain sum. J, before the contract was entered into, and as a basis of negotiation, gave M a memorandum of the assets and liabilities: Held, that the memorandum was admissible in evidence in an action against M as tending to show that the debts so listed were corporate liabilities.—MILLSAPS v. MERCHANTS' & PLANTERS' BANK, Miss., 18 South. Rep. 903.

51. EVIDENCE — Fraudulent Conveyance — Intent of Grantor.—Upon an issue of fact as to whether a transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the one making the transfer is a witness, to inquire of him whether in making the transfer he intended to hinder, delay, or defraud his creditors.—BICE v. ROGERS, Kan., 34 Pac. Rep. 796.

52. FRAUDULENT CONVEYANCE.—A provision in a conveyance of a stock of goods in trust for certain creditors empowering the trustee to sell the goods at retail until the stock shall be so reduced as not to justify further retail sales, and then to sell the remainder in bulk, does not of itself render the instrument void, though the grantor was insolvent, and all his property was conveyed, the property conveyed not being in excess of the amount of the valid debts intended to be secured.—RAINWATER-BOOGHER HAT CO. v. WEAVER, Tex., 23 S. W. Rep. 914.

53. FRAUDULENT CONVEYANCE—Chattel Mortgage.—It is not a fraud on other creditors for one having a valid claim to obtain security for the amount actually due by chattel mortgage, where no more property is covered than is necessary to secure the debt.—FIRST NAT. BANK OF ABILENE v. NAILL, Kan., 34 Pac. Rep. 797.

54. GARNISHMENT — Sums Due Railroad Contractor. —Sanb. & B. Ann. St. § 1815, provides that, where a contract or for the construction of a railroad is liable to laborer for services in the work, the laborer may, within 30 days after his claim is due, serve notice on the railroad company, and thereupon it shall be directly liable to such laborer for the amount due, provided he brings his action within 60 days after notice: Held that, until the determination of the contingent liabilities to laborers, the railroad company was not liable as garnishee of the contractor.—VOLLMER v. CHICAGO & N. W. RY. CO., Wis., 56 N. W. Rep. 919.

55. HIGHWAYS—Assessments.—Under Rev. St. 1881, § 5097, as amended by Elliott's Supp. § 1492, providing that assessments for the construction or improvement of county roads shall be divided in such manner as to meet the principal and interest of the bonds issued for the expenses of such improvement, such duty of dividing the assessments is vested in the county auditor, subject to revision by the courts in case of abuse of authority.—FLORER v. MCAFFEE, Ind., 35 N. E. Rep. 277.

56. HIGHWAYS— Improvements. — When remonstrators have appealed to the Circuit Court from the county commissioners final order for the construction of a free gravel road, on the ground that the petition therefor was not signed by a majority of the resident landholders, whose lands were reported as benefited and subject to assessment, and by the owners of a majority of the whole number of acres so reported, as required by Rev. St. 1881, § 5095, and have obtained a reversal as to themselves, the proceedings of the board are not avoided, as regards a remonstrator who failed to appeal, and he cannot enjoin the county treasurer from collecting the sums assessed against him for benefits. —CASON v. MORRISON, Ind., 35 N. E. Rep. 268.

57. HOMESTEAD—Dedication of Street.—Const. 1868, art. 12, § 2, provides that the homestead of any resident,

who is a married man or head of a family, shall not be incumbered while owned by him: Held, that a person who laid off his homestead into blocks, lots, and streets, for the purpose of sale, but reserved as his homestead the block on which his residence stood, did not incumber his homestead, in violation of the constitution, by dedicating the streets, as laid out, to the city.—CITY OF LITTLE ROCK v. WRIGHT, Ark., 23 S. W. Rep. 876.

58. HOMESTEAD EXEMPTION—Claim after Levy.—Under Code 1886, § 2521, providing that a claim of homestead exemption, if made after levy of execution, shall be made by "filing" with the officer making the levy a verified claim, it is not sufficient that the claim be merely handed to the officer, and then taken back, and filed with the judge of probate for registration, such registration being provided where claim of exemption is made before levy.—SCHEUER v. KING, Ala., 13 South. Rep. 912.

59. HUSBAND AND WIFE.—In the absence of a special promise of the husband to pay for the board and lodging of his wife, living apart from him, he will not be responsible therefor, unless she lives separate from him by his consent, or his conduct was such as to justify her leaving his bed and board.—BELKNAP v. STEWART, Neb., 56 N. W. Rep. 881.

60. HUSBAND AND WIFE—Agreements—Wife's Earnings.—Under Civil Code, § 158, allowing husband and wife to enter into any engagement or transaction with each other respecting property, and section 159, providing that they may by contract alter their legal relations to property, and section 160, making their mutual consent a sufficient consideration for such an agreement, a husband may relinquish to his wife his right in money to be earned by her in nursing and boarding a person, so that she may sue therefor without joining him.—WREN v. WREN, Cal., 34 Pac. Rep. 775.

61. HUSBAND AND WIFE—Antenuptial Agreement.—An antenuptial contract, by which, in consideration of the conveyance to the wife of a life estate in certain property, she relinquishes all her interest in other real estate of the husband, cannot be extended so as to prevent the wife from claiming her statutory allowance of $500, under Rev. St. § 2269, in the estate of her husband, or from compelling a sale of his real estate in order to pay such allowance.—CLAYPOOL v. JAQUA, Ind., 35 N. E. Rep. 285.

62. HUSBAND AND WIFE — Marriage Settlement — Trusts.—A marriage settlement formally conveying land to trustees, and investing them with power to sell and reinvest, and directing them to permit the husband to receive the rents and income, or in case the wife become entitled thereto, under the provisions of the settlement, to pay them to her for her sole and separate use, and, on the death of the husband and wife, to hold the property to the use of their children, vests the legal estate in the trustees, the trust not being a mere formal trust, within the statute of uses, which in such case executes the use, and vests the legal estate in the beneficiary.—DYETT v. CENTRAL TRUST CO., N. Y., 35 N. E. Rep. 341.

63. INJUNCTION — Damages.—An action on the case will not lie for improperly suing out an injunction unless it is charged in the complaint as an abuse of the process of the court through malice and without probable cause.—ASEVADO v. ORR, Cal., 34 Pac. Rep. 777.

64. INJUNCTION—Navigable Water—Erection of Dam.—The erection of a dam across a navigable stream, though a nuisance, will not be enjoined on application of one sustaining no special or personal injury thereby.—ESSON v. WHATTIER, Oreg., 34 Pac. Rep. 756.

65. INJUNCTION — Reservoirs — Injuries.—Mills' Ann. St. § 2272, part of an act giving the right to construct reservoirs for certain purposes, by providing that the owners thereof shall be liable for all damages arising from leakage therefrom, merely affirms a common-law principle, and does not take away the right to injunctive relief against the filling of a reservoir where the injuries suffered therefrom are irreparable.—SYLVESTER v. JEROME, Colo., 34 Pac. Rep. 760.

66. INSURANCE — Mortgagee.—Where a fire insurance policy on premises which are mortgaged for a sum less than the amount insured, recites that the company agrees to make good unto the assured, his executors, etc., all loss or damage caused by fire, not exceeding the sum named, and that the loss, if any, is payable to the mortgagee, such mortgagee, in case of loss, cannot alone maintain in action on the policy.—CARBERRY v. GERMAN INS. CO., Wis., 56 N. W. Rep. 920.

67. INTOXICATING LIQUORS—Unlawful Sale.—On trial of defendant for maintaining a building used for the unlawful sale and keeping of liquor, there was evidence that defendant owned a neighboring house, from which he was accustomed to carry beer to the building occupied by him, and alleged to be a nuisance, and that this carrying of beer was generally coincident with the entrance of men into the latter building: Held, that evidence of the discovery of beer and whisky, seemingly defendant's, in the celler of the neighboring house, was admissible.—COMMONWEALTH v. LYONS Mass., 35 N. E. Rep. 316.

68. LANDLORD AND TENANT—Oil Leases—Forfeiture.—A lessor may declare a lease forfeited as to all the leased premises, the lessee not having been in possession, though he had delivered possession of part of it to a third person, under an agreement of sale.—CARNEGIE NATURAL GAS CO. v. PHILADELPHIA CO., Penn., 27 Atl. Rep. 951.

69. LIBEL—Privileged Communication.—A complaint in an action of libel alleged that defendants maliciously published a certain defamatory article concerning plaintiff, which was, as set forth, a complaint signed by defendants, and addressed to the board of supervisors, for the purpose of obtaining a revocation of plaintiff's license as a saloon keeper; but it is not alleged in what manner it was published: Held, that it was error to sustain a demurrer *ore tenus* to the complaint on the ground that it showed on its face that the alleged libel was privileged, since it would not be privileged unless it was published only by presentation to such board.—WERNER v. ASCHER, Wis., 56 N. W. Rep. 869.

70. LIEN—Laborers Liens.—A teamster is a "laborer," within Act March 9, 1889, § 1, giving "laborers" a lien on any structure for work performed by them thereon, and on the interest of the owner of the land on which it stands.—MCELWAINE v. HOSEY, Ind., 35 N. E. Rep. 273.

71. LIMITATIONS—Statute.—Code 1886, § 2623, permits plaintiff or legal representative to commence suit again within a year after reversal of a judgment for plaintiff, though the statute of limitations has run against the cause of action: Held that, where a judgment for a wife for the loss of property has been reversed because the property belonged to her husband, he cannot, by styling himself trustee of his wife, begin a new suit and avoid the statute under such section.—BYNUM v. MEMPHIS & C. R. CO., Ala., 13 South. Rep. 910.

72. LIMITATION OF ACTIONS—Person "Out of State."—A foreign corporation is a person "out of State," within the meaning of Rev. St. § 4231, providing that, if any person is out of this State when a cause of action against him shall accrue, the action may be commenced within the time limited therefor after his return.—LARSON v. AULTMAN & TAYLOR CO., Wis., 56 N. W. Rep. 915.

73. MASTER AND SERVANT—Defective Appliances.—In an action by a brakeman against a railroad company for personal injuries, proof that the cars which plaintiff was coupling were pushed together with undue force by the engineer, so that plaintiff's arm was crushed was insufficient to make a *prima facie* case of negligence, as the engineer and brakeman were fellow-servants, and

there was no evidence that the engineer was employed without due care, or was incompetent.—EVANS v. CHAMBERLAIN, S. Car., 18 S. E. Rep. 213.

74. MANDAMUS — Jurisdiction of Defendant.—A peremptory writ of *mandamus* will not be granted against the defendant named in the alternative writ when he has not appeared in the action, and there is no evidence of legal service of the alternative writ on him.—STATE v. WALKER, Fla., 13 South. Rep. 928.

75. MASTER AND SERVANT—Negligence.—The failure of an employee of a railroad company to use a danger signal on a car which he was repairing, as required by the rules of the company, cannot be set up as contributory negligence in an action by such employee against another railroad company for injury caused by the backing of an engine of defendant against the car which was being repaired, when such engine was wrongfully on the tracks of the company which employed plaintiff.—FT. WORTH & D. C. RY. CO. v. BELL, Tex., 23 S. W. Rep. 922.

76. MECHANIC'S LIEN—Abandonment of Contract.—In an action to enforce a mechanic's lien for material furnished the contractor, and to fix a personal liability on the owner, the petition showed that the contractor abandoned his contract, and that at that time the owner had paid him more than was due him on the contract, so that, when plaintiff gave the owner notice of his claim of lien, the owner owed the contractor nothing: Held, that the action could not be maintained.—RICKER v. SCHADT, Tex., 23 S. W. Rep. 907.

77. MECHANIC'S LIEN—Notice—Variance.—A material man gave notice to defendant of a claim to a lien "on lot 6, 7, or 8," the lot being in P & H's addition to Indianapolis, on the west side of Q street, and about three fourths of a square south of P street, owned by defendant, and on the dwelling house recently erected by defendant thereon. In his action to enforce the lien, plaintiff averred the house was erected on lot 6: Held, that it was error to sustain a demurrer to the complaint on the ground that the notice was insufficient, and the description defective; but the question as to whether the description in the complaint was at variance with the notice should have been submitted for trial.—DALTON v. HOFFMAN, Ind., 35 N. E. Rep. 291.

78. MORTGAGE—Assignment—Latent Equities.—Where a mortgagee represents a forgery as the genuine mortgage note, and indorses it as such to an innocent purchaser, and afterwards indorses the genuine note before maturity to another innocent purchaser, the latter, as equitable assignee of the mortgage, acquires title thereto free from any claim by the former purchaser, since the assignee of a mortgage takes it free from latent equities in favor of other persons than the mortgagor.—HIMROD v. GILMAN, Ill., 35 N. E. Rep. 373.

79. MORTGAGE—Delivery.—Where a mortgage is executed and delivered in escrow with a third person to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery thereof by the custodian to the mortgagee without the knowledge or consent of the mortgagor, before the fulfillment of the conditions by the mortgagee, will not have the effect to confer any interest in the mortgaged property upon the latter or upon an assignee with notice. A mortgage delivered to a third party in escrow, to be by him delivered upon the happening of some contingency, or upon the performance of some condition, does not become effectual as a delivered instrument until such second delivery. — ROBERSON v. REITER, Neb., 56 N. W. Rep. 877.

80. MORTGAGE — Fraudulent.— A mortgage covering a stock of merchandise, under which the mortgagor is permitted, by agreement or understanding of the mortgagee, to sell the goods at discretion, or in the usual course of business is fraudulent and void as to existing creditors of the mortgagor, and it makes no difference whether the agreement or understanding in reference to the sale of the goods be expressed in the mortgage itself, or not. It was so agreed or understood at the time the mortgage was executed, whether in writing or parol, the sucurity is thereby rendered void as to the creditors of the mortgagor.—ECKMAN v. MUNNERLYN, Fla., 13 South. Rep. 922.

81. MORTGAGES— Redemption— General Creditors.—To a creditors' bill making a mortgagee of the debtor defendant, and seeking a redemption from the mortgage and a sale for the benefit of the creditors, defendant mortgagee demurred on the ground that complainant, being only a general creditor, had no right to redeem: Held, that an order sustaining the demurrer was final, as to proceed further on the creditors' bill would have been fruitless. — MCNIECE v. ELIASON, Md., 27 Atl. Rep. 940.

82. MORTGAGE FORECLOSURE—Rights of Purchaser.—A purchaser at a mortgage foreclosure sale by advertisement has only such rights as are specially given him by statute. The provision of section 5159, Comp. Laws, which says: "The purchaser from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents and profits of the property sold, or the value of the use and occupation thereof,"—has no application to sales made at a mortgage foreclosure either by advertisement or by action.—RUDOLPH v. HERMAN, S. Dak., 56 N. W. Rep. 901.

83. MUNICIPAL CORPORATIONS— Defective Sidewalks —Negligence.—The corporate authorities of a city permitted a lot owner to make a dangerous cellarway in a sidewalk and street in front of his house, which he subsequently covered with a frail trap-door that was defective in construction, and around which no safeguards were placed. It remained in this condition for about two months, when a person traveling over the sidewalk stepped upon the trap-door, which broke down, and precipitated him into the excavation below, causing severe personal injuries: Held, that the city cannot relieve itself from responsibility because the dangerous and unguarded opening was made and covered by the lot owner.—CITY OF ABILENE v. COWPERTHWAIT, Kan., 34 Pac. Rep. 795.

84. NEGLIGENCE— Proximate Cause. — In an action against a street-railroad company for damages to plaintiff's carriage, it appeared that plaintiff, an undertaker, occupied his carriage in front of a funeral procession; that he arrived at a street crossing about the time defendant's car reached such crossing; that the car suddenly stopped directly across the street on which the procession was moving, and compelled plaintiff to stop suddenly within five feet of the car; that all the carriages in the rear were thus caused to stop suddenly; and that the pole of the first of such carriages came in contact with plaintiff's carriage, and broke in the panels: Held, that the stopping of the car was the proximate cause of the damage to plaintiff's carriage.—MUELLER v. MILWAUKEE ST. RY. CO., Wis., 56 N. W. Rep. 914.

85. NEGLIGENCE—Trespasser— Exemplary Damages. —A trespasser on a railroad train is entitled to recover for a wanton, willful, or intentional wrong committed by a brakeman within the scope of his employment, and to have exemplary damages included in the verdict.—MOBILE & O. R. CO. v. SEALS, Ala., 13 South. Rep. 917.

86. NEGOTIABLE INSTRUMENT—Bona Fide Holders.—The mere crediting of a check on the books of a bank, which may be canceled at any time, does not make the bank a *bona fide* purchaser; and if after such credit, and before actual payment on the faith thereof, the bank receives notice of the invalidity of the check, it does not become a *bona fide* holder for value by a subsequent payment.— THOMPSON v. SIOUX FALLS NAT. BANK, U. S. S. C., 14 S. C. Rep. 94.

87. NUISANCE—Pollution of Stream.— A corporation organized for the purpose of supplying a city with water can only gain a standing in a court of equity to enjoin a pollution of the stream whence it obtains its

supply, by reason of special pecuniary damage caused to it, but when it is thus in court the relief will be granted not only on that ground, but also on the ground of benefit to the public, which uses the water.—INDIANAPOLIS WATER CO. v. AMERICAN STRAWBOARD CO., U. S. C. C. (Ind.), 57 Fed. Rep. 1000.

88. PLEADING—Demurrer—Repugnancy.—In an action by a bank on a note the answer of the maker stated that the note was given in part payment of a machine purchased of A; that the machine was sold on a written warranty of which there had been a breach; that the bank did not become the owner or holder of such note till after maturity, "or, if it did become such owner, it was only for the purpose of collecting the same for A, or with the agreement and understanding with A that A would keep the bank whole and harmless:" Held, that such answer was demurrable for repugnancy, as one material statement, following the other, but coupled by the disjunctive "or," rendered the whole nugatory and meaningless. — SECOND NAT. BANK OF SPRINGFIELD v. HART, Ind., 35 N. E. Rep. 302.

89. PLEDGE — Agreement of Parties.—The remedy of the pledgee, and the disposition to be made of a pledge of commercial paper upon default or other contingency, may be regulated by the agreement of parties where such agreement is not fraudulent, or against statute or public policy.—HUNTER v. HAMILTON, Kan., 34 Pac. Rep. 782.

90. PLEDGE — Collateral — Declarations of Agent.—Where a note and mortgage were transferred to an incorporated bank as collateral security and for collection, evidence of the statement of the cashier of such bank, made while the note and mortgage were still in the bank uncollected, to inquiries as to whether or not they had been collected, that the failure to collect the note and mortgage was the "fault" and "neglect" of the bank, was not admissible, such statement not being the statement of any fact in the line of his duty as such cashier, nor within the scope of his authority as an officer of the bank, but the mere expression of his opinion as to the conduct of the bank. — PLYMOUTH COUNTY BANK v. GILMAN, S. Dak., 56 N. W. Rep. 892.

91. PRINCIPAL AND AGENT—Estoppel.—Neither express nor ostensible agency can be proved by declarations or acts of the alleged agent unless the alleged principal is connected with them.—MILLS v. BERLA, Tex., 23 S. W. Rep. 910.

92. PRINCIPAL AND AGENT—Ratification — Attorney.—The acceptance of the services of attorneys, and the receipt of the avails thereof, operate as a ratification, and cure any want of authority in the agent who employed them.—EHRSAM v. MAHAN, Kan., 34 Pac. Rep. 800.

93. PRINCIPAL AND AGENT—Special Agency.—A contractor for work in the construction of a railroad has, under a direction of the road's division superintendent to order of plaintiff stone to be furnished to the railroad company, power to bind the company by a purchase of such stone from plaintiff.—UNION PAC., D. & G. RY. CO. v. MCCARTY, Colo., 34 Pac. Rep. 767.

94. PUBLIC SCHOOL LANDS. — The fact that public school land was sold to one who was not an actual settler thereon, in violation of Act April 1, 1887, amended April 8, 1889, may be alleged and proved by one claiming such land under a subsequent application to buy while an actual settler thereon, the right to attack such sale not being in the State alone.—EASTIN v. FERGUSON, Tex., 23 S. W. Rep. 918.

95. RAILROAD COMPANIES — Accidents at Crossings—Negligence.—In an action against a railroad company for negligently causing death at a crossing, it is not necessary for the plaintiff, although he has the burden of proof as to deceased's use of due care, to introduce testimony that deceased looked and listened for approaching trains, since in many cases proof on that point would not be obtainable.—ILLINOIS CENT. R. CO. v. NOWICKI, Ill., 35 N. E. Rep. 358.

96. RAILROAD COMPANY — Crossings — Contributory Negligence.—Where plaintiff's testimony in an action for injuries received at a railroad crossing is confused and contradictory as to whether, before going on the track, he stopped, looked, and listened at a place where he could see an approaching train, he is entitled to go to the jury, as negligence on his part does not affirmatively appear from such testimony. — ELY v. PITTSBURGH, C., C. & ST. L. RY. CO., Penn., 27 Atl. Rep. 970.

97. RAILROAD COMPANIES—Killing Stock.—A railroad company must remove bushes or other growth, calculated to obstruct the view of its engineers, to the outer bank of the side ditches, or from all the ground of which it assumes actual dominion for corporate purposes; and if it fails to do so, and a horse is killed by a train because concealed by the bushes, it is liable.—WARD v. WILMINGTON & W. R. CO., N. Car., 18 S. E. Rep. 211.

98. RAILROAD COMPANY—Negligence.—Where an experienced railroad man, on a bright day, with nothing to obstruct his vision, starts across and along a railroad track with which he is entirely familiar, while cars are slowly approaching only 25 or 30 feet away, and is struck thereby, he is guilty of contributory negligence; and it is immaterial that his apparent intention was to remove a hand car, to which his attention was suddenly called, out of the way of other cars approaching it on an opposite siding.—ELLIOTT v. CHICAGO M. & ST. P. RY. CO., U. S. S. C., 14 S. C. Rep. 85.

99. RAILRAOD COMPANY—Negligence.—The mere fact that a train which caused an injury to a person on the track, was running at a speed prohibited by an ordinance, which merely prescribed a penalty for its violation, is not, *per se*, conclusive proof of negligence, rendering the railroad company liable, but such violation must have been the proximate cause of the injury; and whether the company is liable is for the jury, and not the court, to say.—BECK v. PORTLAND & RY. CO., Oreg., 34 Pac. Rep. 753.

100. RAILROAD FORECLOSURE—Decree—Extraterritorial Operation.—In the foreclosure of a mortgage on a railroad situated partly in two States, a court of one State cannot merge into its judgment the lien on the property in the other State, and, while it may act upon the person of defendant, so as to compel it to make conveyances or releases, yet, if it has not done so, its mere judgment is not a bar to a suit in the other State, between the same parties, to foreclose the same mortgage there.—LYNDE v. COLUMBUS, C. & I. C. RY. CO., U. S. C. C. (Ind.), 57 Fed. Rep. 993.

101. RAILROAD RECEIVERS—Leased Lines.—A railroad road receiver, even though appointed on the petition of the railroad company itself, and for the express purpose of preventing the disintegration of the system, does not become liable for rentals upon leased lines, *eo instanti*, by the mere act of taking possession but he is entitled to a reasonable time to ascertain the situation of affairs.—UNITED STATES TRUST CO. v. WABASH W. RY. CO., U. S. S. C., 14 S. C. Rep. 86.

102. REAL ESTATE AGENT—Commissions.—A real estate agent is entitled to his commissions when he procures a purchaser, ready, able, and willing to buy on the terms authorized by the principal, and no binding, written contract of sale is required when the principal is in a situation to execute it himself.—GELATT v. RIDGE, Mo., 26 S. W. Rep. 882.

103. SALE — Rescission — Collateral.—Defendants ordered machinery from plaintiffs, which was to be taken on condition that he should not acquire title until purchase money notes should be paid, and that, on failure to pay them, plaintiffs might retake the machinery, and retain what had been paid as hire. Defendant failing to meet the notes, further time was given him, in consideration of an additional note, secured by chattel mortgage on other property, to be held as additional security for the purchase money notes. On defendant's failure to pay the latter notes, plaintiffs surrendered them, and retook possession of

the machinery: Held, that the additional note was in the nature of collateral to the purchase money notes, and it was discharged by the disaffirmance of the sale.—GREEN v. SINKER, DAVIS & CO., Ind., 35 N. E. Rep. 262.

104. SALE—Special Guaranty.—A breach of a special guaranty by a seller of flour "that the flour sold would give satisfaction to the customers of the purchaser" does not give the purchaser any greater rights against the seller than would a simple breach of a warranty implied by law, and does not authorize a rescission of the contract of sale.—KAUFFMAN MILLING CO. v. STUCKE, S. Car., 18 S. E. Rep. 218.

105. SCHOOL DIRECTORS—Locating Schoolhouse.—The discretion of a board of school directors as to the location of schoolhouse is not subject to the control of equity.—ROTH v. MARSHALL, Penn., 27 Atl. Rep. 945.

106. SCHOOL ELECTIONS.—The fact that an order providing for an election of the board of education was passed by less than a quorum of the board does not affect the validity of the election, where it is held at the time provided therefor by statute, and there is no statute provision requiring such order to be made.—ACKERMAN v. HAENCK, Ill., 35 N. E. Rep. 381.

107. SPECIFIC PERFORMANCE—Evidence.—Where, in a suit to enforce an oral agreement for the conveyance of land, the parties to the agreement directly contradict each other as to the existence of the agreement, and the corroborating witness merely swear to certain admissions as to the existence of an agreement of some kind, but not revealing its terms, the agreement and its terms are not proved with sufficient certainty to justify a decree for specific performance.—BARRETT v. GEISINGER, Ill., 35 N. E. Rep. 354.

108. TELEGRAPH COMPANIES — Delay — Damages.—Mental pain caused by delay in delivering the message is a proper element of damages; and, in an action by the addressee against the company, an allegation that plaintiff would have taken a train enabling him to be present at the funeral, if the message had been seasonably delivered, is not the statement of a result too remote and contingent to support the action.—WESTERN UNION TEL. CO. v. LYNN, Tex., 23 S. W. Rep. 895.

109. TRIAL—Jury Trial—Waiver.—It was error for the court to refuse defendants a jury trial on the ground that they had waived their right by failing to call for one when the appearance docket was called for orders, and that the demand came too late after a motion for a continuance had been overruled, it not appearing that any jury was in attendance when the docket was called, and was discharged because of failure to demand a jury trial.—COOK v. COOK, Tex., 23 S. W. Rep. 927.

110. TRUSTS—Fraud—Tracing Funds.—Where a bank induced collections and deposits by false representations of solvency, creditors cannot have a trust declared in their favor in the assets of the bank in the hands of a receiver without showing that the receiver has or ever had collected them, or deposited money or property in which such money was invested.—ST. LOUIS BREWING ASS'N v. AUSTIN, Ala., 13 South. Rep. 908.

111. TRUST—Partnership.—Two brothers, owning adjacent farms, engaged in the farming business in partnership, and one of them bought 160 acres of adjoining land under an agreement that the north half should belong to him and the south half to his brother, paid for the land with money derived from the partnership business, and took title in his own name: Held, that he held title to the south half in trust for his brother.—VAN BUSKIRK v. VAN BUSKIRK, Ill., 35 N. E. Rep. 383.

112. VENDOR AND PURCHASER — Leasehold Estate.—Where an officer levies on and takes possession of goods belonging to a tenant, in a leased building, but does not levy on the building, and the tenant, while the officer is in possession, conveys his leasehold interest, by unrecorded deed, to a third person, who then levies the building to such officer, subsequent attaching creditors and purchasers of the leasehold are affected with notice of the character of the officer's possession and the rights of his landlord.—LE DOUX v. JOHNSON, Tex., 23 S. W. Rep. 902.

113. VENDOR AND PURCHASER—Possession as Notice.—Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor.—KAHRE v. RUNDLE, Neb., 56 N. W. Rep. 888.

114. VENUE—Change of.—The removal of a cause to a county where the subject-matter of the cause is located, and where a large number of witnesses, whose testimony is material to prove the cause of action, reside, is a proper exercise of discretion.—POSTEL v. WEINHAGEN, Wis., 56 N. W. Rep. 913.

115. WATERS — Subterraean Waters — Diversion.—In an action on a bond conditioned to save plaintiff harmless from all damage which may be sustained by her by reason of defendants' digging a gas well on premises adjoining hers, defendants cannot complain of an instruction that they are liable for cutting off a subterranean spring feeding two wells on plaintiff's premises, if they neglected any precaution that would have prevented the diversion of the subterranean stream.—STEELE v. TODD, Penn., 27 Atl. Rep. 942.

116. WILL — Contest — Evidence.—Where the proponents of the will rest after introducing in evidence the will, the probate thereof, and the testimony of the subscribing witnesses, and the contestants thereupon introduce evidence tending to show want of testamentary capacity, the proponents have no right to introduce in rebuttal evidence as to the testator's capacity, since that is part of their evidence in chief.—CRAIG v. SOUTHARD, Ill., 35 N. E. Rep. 361.

117. WILLS — Signing — Witnesses.—Under Gen. St. § 1854, providing that a will shall be signed by testatrix, or by another person in her presence, and by her express directions, and shall be attested and signed by three or more witnesses, the person signing for testatrix may sign as a witness.—EX PARTE LEONARD, S. Car., 18 S. E. Rep. 216.

118. WILLS — Probate — Testamentary Capacity.—While the burden of proof as to the capacity of testator rests on the proponent of the will, it is enough, in the first instance, that one or more of the attesting witnesses, or all, if within reach and contestant requires it, be examined as to the execution of the will and testator's capacity, their testimony being confined to the appearance, conduct, and surroundings of testator at the time of the execution of the will, and their opinions based thereon. Then, if their opinions are favorable to testator's sanity, contestant will go forward with affirmative evidence of insanity, and proponent will rebut; there being always a presumption in proponent's favor of testator's sanity, which will control, unless it is counter balanced by a preponderance of evidence in favor of contestants.—IN RE BARBER'S ESTATE, Conn., 27 Atl. Rep. 973.

119. WITNESS—Privileged Communications.—Where there is no legal representative of a testatrix, her physician cannot testify as to her mental condition, from his knowledge and information, and from conversations with her, as no one but the patient, or, in case of her death, her personal representative, can waive the seal of secrecy and confidence as to communications with a physician.—GURLEY v. PARK, Ind., 35 N. E. Rep. 279.

120. WITNESS — Transactions with Decedent.—Under Code Civil Proc. § 590, which provides that "no party shall be examined in his own behalf against the administrator of a deceased person except where the administrator is examined in his own behalf concerning the same transaction," the administrator of the payee of a bond is competent to prove its execution by defendant, and testifying to such execution renders defendant a competent witness "concerning the same transaction" only.—WILLIAMS v. COOPER, N. Car., 18 S. E. Rep. 215.

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